

Book Review

Equity and Commercial Relationships — (Finn (Ed), Law Book Co, 1987. \$54)

Professor Finn has produced another volume of essays. This one takes as its theme the modern infusion of select equitable doctrines into the field of commercial law.

Following the success of his *Essays in Equity*, Law Book Co, 1985 a seminar held at the Australian National University and attended by a small group of judges, practitioners and academics provided the basis for this work. The result is a collection of essays of immense practical value to the commercial lawyer.

The book contains a well balanced selection of essays that address the needs of the commercial draftsman, the barrister involved in commercial litigation and even the commercial law reformer. Its variety provides to the busy browser many opportunities for 'cherry picking' novel ideas but its depth will establish it as a sound future reference work. If I were ever foolish enough to take a legal reference book away on a beach holiday this work would be a prime candidate for the journey.

The New South Wales Bar may even take some parochial pride in the numbers of its present and former members whose contributions have been included by the editor. Mr Justice Kearney writes on "Accounting for a Fiduciary's Gains in Commercial Contexts", Mr Justice Priestley on "The Romalpa Clause and the Quistclose Trust" and Dyson Heydon on "Directors' duties and the Company's Interests." Mr Justice McClelland contributes a commentary to a paper by W J Gough "The Floating Charge: Traditional Themes and New Directions."

Interspersed with the to-be-expected discussions about the nature of the constructive trust and its remedial flexibility there are papers to inspire the legal lateral thinker. One that caught my fancy was "Modern Portfolio Theory and the Investment of Pension Funds" by W A Lee, a reader in law at the University of Queensland. Lee points up some of the insights of the 1984 Monaghan Report into the management of the Commonwealth's Superannuation Investment Trust. Dealing with the investment of large trust funds Lee explains how the 'efficient capital market hypothesis' (that the price of a share quoted on the stockmarket reflects immediately all publicly available information concerning that share at that time) has led to 'the modern portfolio theory' of management of such funds. On a long term basis the modern portfolio theory counsels an Australian trustee

of a large fund to invest in all the shares in the All Ordinaries Index in proportion to the capitalization of each company. Lee then considers the practical limits on the powers and liabilities of a trustee who wishes to follow the modern portfolio theory by matching its investments to the All Ordinaries Index.

Some of the other more traditional papers deserve special comment. For those who are more than occasionally perplexed by the rules in relation to priorities among charges over company assets, W J Gough's paper provides an invaluable summary of the present priority rules. Gough also discusses the latest designer features of the floating charge and the likely future strategies of its draftsmen. He concludes his paper by pointing out that there is no obstacle in authority to prevent Australian judges using the equitable doctrine of constructive notice to restore the floating charge to a position of greater commercial usefulness.

Most of the judicial contributors to these essays praise the constructive and flexible role played by equity in the commercial context. In his paper Mr Justice Kearney includes an illuminating discussion about the accountability of fiduciaries for gains from activities that are not strictly in breach of fiduciary duty but are indirectly associated with such a breach. He also discusses the capacity of the Courts to apportion property and make allowances to fix the extent of the gain for which a defaulting fiduciary is to be held accountable.

In contrast Professor R.P. Austin's paper "Fiduciary Accountability for Business Opportunities" is more critical. He bemoans the fact that Australian Courts have not yet followed their United States counterparts and established a 'special business opportunity doctrine' applicable to the unauthorized profit-making activities of full-time executive commercial fiduciaries. Austin concludes:

"But equity and commerce will co-exist in an atmosphere of critical hostility unless equity judges reinforce their broad fiduciary incantations, their 'counsels of prudence' with some more specific rules or themes which will make the application of fiduciary principles more predictable to businessmen and their legal advisers."

Finally, for any barrister needing inspiration in a matter involving joint ventures, trading trusts, shareholder agreements or directors' duties, a few minutes with this book will not be wasted. □

M.J. Slattery

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