BOOK REVIEWS

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Proprietary Claims and Remedies

By **Malcolm Cope**
The Federation Press, 1997
ISBN 1862872538

The distribution of property in the event of bankruptcy or insolvency provides the context in which Professor Malcolm Cope examines equitable proprietary claims and remedies. The background for his analysis is the circumstance whereby a claimant can claim entitlement as a beneficiary in respect of property in the hands of a bankrupt. Such property is not beneficially owned by the bankrupt and is thus not available for division amongst the general creditors.

A central theme of this book is the balance of interests that must be struck by the courts between holders of equitable proprietary rights and general creditors. This theme is revisited many times in the text and serves to unify the many principles and theories which are discussed.

After setting the scene of competing interests in the context of bankruptcy and insolvency, Professor Cope comprehensively summarises the law in relation to equitable proprietary claims. The basic prerequisites of a proprietary claim are discussed in fine detail. The law in this respect is far from settled. The author guides us through a wide range of decisions and theories, some of which define the legal principles in the language of one branch of the law, such as restitution, while rejecting the language of another, such as trusts. In particular, the writings of P.B.H. Birks and R.M. Goode are usefully summarised and contrasted.

The chapters in this work are very useful in isolation while still forming a logical progression from the basic prerequisites of a proprietary claim (i.e. a proprietary interest and a fiduciary relationship, neither of which are universally accepted) through to priorities and deals briefly with the relevant remedies such as constructive trusts, equitable liens and subrogation.

A very interesting discussion ensues on the defence of change of position. The development of this doctrine is traced from its beginnings through to its rapid development in recent cases. The author states his opinion that the usefulness of this doctrine will continue to grow. Professor Cope uses this defence to provide modern day justifications for difficult aspects of cases such as *Re Diplock* [1948] Ch 465.

Part two of this book concentrates on tracing. This is the practical side of maintaining an equitable proprietary claim in the face of bankruptcy. Tracing is neither a right nor a remedy – it is a process. Professor Cope rehearses the principles of tracing in regard to various permutations of mixed funds. In a complex case, a fund can consist of property belonging to the fiduciary, multiple claimants and innocent volunteers. Equity is shown to be far superior to common law in its ability to trace money into mixed funds and to develop new and fair principles for its distribution.

The book is concluded by Professor Cope's recommendations for the improvement of this area of the law. Most of the conclusions given are not surprising in light of the author's treatment of the relevant case law in preceding chapters, however it is unfortunate that the most original section of the text is considered to be worthy of only six pages.

The book is well set out with the numerous headings being listed at the beginning of each chapter. One criticism is that the author occasionally gets bogged down in groups of cases which are now of limited relevance. This could well be a symptom of the tortuous path laid down by past judges and commentators of various jurisdictions.

Another criticism is that occasionally a particular word has been typed incorrectly e.g. 'transferee' instead of 'transferor'. Thorough proofreading of the final text would have prevented some confusion.

On the whole, Professor Cope has written a very helpful book on an area of the law which is admittedly narrow but of great importance to those individuals and businesses affected by another's bankruptcy or insolvency.

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The Modern Approach to Statutory Construction

By **Reg Bartley**
Reg Bartley, 1998
ISBN 0646352083

This book, which is structure around four parts, is focussed primarily upon the correct legal methodology that should be adopted in the interpretation and construction of statutes, a topic which at times challenges not only the legal profession but also the courts.

Part One of the book examines the role of the judges, courts, parliament and the legislature in statutory construction. This part is further subdivided into the following subheadings – the modern approach to statutory construction, the intention of the parliament, the policy of the legislature, the role of the judges and the courts and the evolution of the rules for statutory construction.

The approach that the author has then chosen to take is to set out, under each subheading, a concept which is critical to an understanding of that subheading. For example, under the subheading the role of the judges and the courts, the author highlights the following concepts:

- Their law making function
- Judicial independence
- An example of "pure legislation" by the High Court
- The fundamental duty of the courts is to be faithful to the purpose of the parliament
- The absence of any power in the courts to invalidate acts of parliament

The author then precisely explains each critical concept by reference to statements of principle obtained from various decisions of the courts.

A significant proportion of the book is taken up by Part Two which sets out in great detail the canons and rules of statutory construction. The author has followed the pattern established in Part One by explaining each rule or canon of statutory construction by reference to decisions of the courts which have examined the relevant principle.

Parts Three and Four respectively contain annotated versions of the *Acts Interpretation Act 1901* (Cth) and the *Interpretation Act 1987* (NSW).

Whilst the book has been written with the object of further exciting the public interest in the subject of statutory construction and interpretation it will also provide a very useful reference work for legal practitioners engaged in the exercise of construing an act of parliament. It would therefore not be out of place in any legal practitioner's library.

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