BOOK REVIEWS

***Equity, Restitution & Fraud,* John Glover, LexisNexis Butterworths, Australia, 2004.**

"Equity and restitution are natural bedfellows" begins the Preface to John Glover's *Equity, Restitution & Fraud.* The book discusses the relationship between equity and restitution, focussing on the availability of proprietary restitutionary remedies for breaches of equitable obligation ("frauds"). The work deals with three significant equitable doctrines (all of which fall into the category of 'primary wrongs') – the fiduciary relationship, unconscionability, and breach of confidence – and examines the available remedies against both primary wrongdoers and third parties.

Two themes underlie the book. The first is the decline of robust individualism in the law and the ascendancy of trust as the standard by which individuals' conduct is to be judged. Actions, the author suggests, are no longer solely legitimated according to any 'right to be selfish' as at common law. They are instead determined by relational questions of how one person is to behave in relation to another. The second, and associated, theme is that the role of trust in modern commercial transactions has expanded, resulting in equitable principles coming to represent baseline entitlements around which other systems of remedies function. (page 11). Commercial lawyers also employ equity in situations where a 'contested *locus of value'* exists – allowing proprietary remedies to be imposed on misappropriated funds and other assets.

As with any work dealing with this subject-matter, the first chapter of the book sets out the author's understanding of the inter-relationship between equity (which classifies rights and remedies, but is not equal to either), restitution (the label given to the response of the law to a causative event), and fraud (which describes types of events – namely breaches of duty – that trigger the law's response). The list of abbreviations at the front of the book will provide a clue to the author's view of the areas of law discussed – the oft-cited authors listed notably include Birks, Burrows, Finn, and Goff & Jones. The author maintains a dualist view of the relationship between the common law and equity – seeing each branch of the law as occupying its own sphere. This view contrasts with that of Birks and Pretto in *Breach of Trust* (2002), that "There is one law to which two jurisdictional streams have contributed... There is no longer, any need, for instance to insist on separating common law torts and equitable wrongs or to double up the vocabulary of money

awards for wrongs to preserve the distinction between damages and equitable compensation."

Glover begins by establishing the importance of equity generally. He characterises equity as "a supplement, or corrective, to judge-made law, but it is not a rival" (page 5). Equity functions as "a body of doctrines which helps to overcome this inflexibility problem in the law" (page 6), providing individuated "corrective norms", asking, at page 9, how a person in a given position should act: "What standard of conduct should the law require to facilitate this type of action?" The book concentrates on the divide between ownership and obligations in non-trustee contexts.

Glover then outlines the view of restitution upon which the book proceeds. 'Quadrationist' thinking is rejected in favour of a 'multicausalist' approach; the author rejects the view that unjust enrichment explains all restitution, preferring the view that restitutionary responses can be triggered by any one of a number of distinct causative events. The book's province, however, is stated to be situations in which equitable doctrines trigger restitutionary proprietary claims, rather than a treatment of unjust enrichment generally as the category of response to several causative events. Restitution and equity are linked by the author's suggestion that restitutionary remedies provide proprietary remedies for breaches of duty, rather than *in personam* rights. The 'fraud' in the title of the book refers to 'civil constructive' fraud – that is, breach of equitable obligation – "a breach of duty to which equity attaches its sanction" (pages 21-22).

From this point, the book sets out to discuss the existence, scope, and breaches of fiduciary relationships (chapters 2 to 4), unconscionable dealing and breach of confidence (chapters 5 and 6), and remedies against both primary wrongdoers and third parties (chapters 7 and 8). It is clear from the discussion that Glover has two foci – commercial dealings generally and the Australian context in particular.

The means of determining the existence of fiduciary relationships are clearly discussed. Glover sets out first the accepted categories, and then lucidly discusses the principles upon which analogous categories rest. The discussion widens at the end of chapter two to include non-commercial fiduciary relationships. (Glover concludes that public law fiduciaries "are an anomaly", at 129.) This discussion encompasses indigenous peoples/government and local authorities/constituents, with a detailed discussion of the recent case of *Cubillo v Commonwealth* (2001) 112 FCR 455 (FC), in which the claimants (two aboriginal people) argued that they had been forcibly

removed from their families by the Commonwealth government and detained in state institutions.

Chapter three examines the scope of fiduciary duties. Glover divides the discussion into kinds of relationship – employer/employee, partners, corporations, and finally a discussion of the US "corporate opportunity" doctrine. One notable feature of this chapter is the detailed application of the profits and conflicts rules to corporate relationships, particular those between directors and the company on behalf of which they are to act.

The following chapter sets out the rules surrounding breaches of fiduciary duties, in particular the conflicts and profits rules, and applies them to company directors, corporate receivers and liquidators, and solicitors. It then outlines the defences of consent, exclusion clauses, change of position and delay (*laches* and waiver).

The following two chapters deal with unconscionable dealing and breach of confidence. It is perhaps in these areas that the mitigating effect of equity on the common law (particularly contractual doctrine) is most apparent. The use of the unconscionability norm directly as a means of invalidating contracts entered into in circumstances that do not amount to breach of fiduciary duty or estoppel forms the underlying concept over which specific equitable rules are given effect – undue influence and unconscientious dealing, for instance.

The discussion of the relationship between equity and contract in chapter 6 is notable for dealing directly with the assimilation in leading cases of the contractual obligation of confidence with the equitable one. Glover points out that equitable remedies will only be available if the breach of confidence fulfils the requirements of the equitable obligation of confidence, and not the contractual one. If the obligations are to be treated as the same, Glover writes, "[s]ubordination of one, or their assimilation, is necessary". The chapter then proceeds to discuss the two avenues in equity for the protection of confidential information – breach of confidence and breach of fiduciary duty. These two avenues are based in different policy considerations, which are also discussed in the section.

The book's focus then turns to remedies. Equity clearly remains significant in commercial transactions today because of the availability of remedies that retain priority on insolvency. Against primary wrongdoers these are classified into five categories – proprietary remedies, recovery of misappropriated property (via means of constructive trust, lien and subrogation), disgorgement of gains, avoidance of vitiated transactions, and restoration of losses. Particularly noteworthy in this section is the discussion of proprietary remedies and their relationship with insolvency.

Glover's discussion of disgorgement (at 403 to 420) of gains is particularly useful in that it again links the themes of the book to each other – the role of relationships of trust in the law, the availability of such remedies, and their nature. It also provides a useful discussion of the difficult area of account of profits, clearly discussing some of the more complicated cases.

Against third parties there is also a discussion of primary liability in terms of the enforcement of property rights and intermeddling "de son tort". The doctrines of knowing assistance and knowing receipt or dealing are discussed. The discussion in this section proceeds around the degree of blameworthiness of the third party conduct, linking this section with the discussion in chapter 1 of the underlying basis of equitable claims being in the position of the individual in relation to others, and the question of what a person in a particular situation should do.

Finally, two general features of the book should be mentioned. The first is the detailed coverage of case law in the area, and its close analysis. The complex concepts discussed are amply illustrated, and in such a way as to make comprehensible often intractable theoretical points. This aspect of the work makes it particularly useful for students and practitioners. The second is that each section is helpfully broken down into its constituent parts, allowing the reader easily to move to the sections that are relevant for his or her purposes.

Equity, Restitution & Fraud is a valuable addition to scholarship in the area of equitable remedies, allowing students to see the inter-relationship between equitable causes of action and restitutionary remedies.

Vicki McCall, BA/LLB(Hons)

***Advocacy*, David Ross QC, Cambridge University Press, Cambridge, 2005.**

Texts explaining the art of advocacy are unusual creatures. The skilled advocate is, according to most of these texts, the advocate who can make his or her case in the most concise manner, and with the greatest clarity. Ironically, it usually takes the authors well over a hundred pages to make this point, which tends to undermine the text's effectiveness. David Ross QC's text *Advocacy*, however, does not succumb to this general trend, but is actually written clearly and concisely. Ross states in the first chapter that '[a]dvocacy is winning cases. Nothing more and nothing less' (page 1), and the book very much follows in that unrelentingly practical vein.

The focus of the text is on trial, rather than appellate advocacy. The author looks almost exclusively at the mechanics of the effective conduct of a trial, with very little discussion of written submissions. However, not all of the book focuses on the actual dramatics of the courtroom. There is a very useful and perceptive chapter about the importance of preparation, as well as the author's tips on how to make one's preparation most effective. The text then shifts its gaze into the courtroom, where it remains firmly fixed.

True to the nature of a trial, *Advocacy*'s main focus is on witnesses: how to deal with them, and how to use them in order to win your case. There is a general chapter on witnesses and questions, followed by a chapter on examination-in-chief. In four chapters on cross-examination Ross looks at the use of cross-examination, methods and styles of cross-examination (which is largely the author's advice on how to deal with certain matters that may arise or certain types of witnesses), and then at two specific areas of cross-examination; namely cross-examination of expert witnesses and cross-examination of documents. Accompanying many of the individual points made by the author are examples gleaned from trials that illustrate the point in practice. This is a very useful technique that adds to both the effectiveness of the point made and the pedagogical value of the book: reading a transcript in which an advocate successfully used one of the suggested techniques removes the dryness that accompanies many advocacy texts and emphasises this text's practical focus. The final chapters generally examine admissibility, objections and submissions, addresses, pleas in mitigation and etiquette.

The text's main weaknesses stem from its highly practical nature. Those seeking a more arid discussion of advocacy theory will find themselves sorely disappointed. Also, the style of writing tends to be a little disjointed if the work is read as most people read a textbook. The work is by far most effectively used if the reader is after a specific point and simply looks for the author's view on that point alone. Fortunately, a detailed contents page means that the text can be used in this way with ease.

Because of its Australian basis and the lack of detailed discussion about any particular rules of court conduct, *Advocacy* is unlikely to ever replace the New Zealand Law Society's text as the main treatise on advocacy in New Zealand. However, for the advocate looking for trial advocacy techniques that will assist counsel to win cases in any jurisdiction, *Advocacy* provides an excellent point of reference.

Isaac Hikaka

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