Equity, Fiduciaries and Trusts edited by T. D. Youdan (The Carswell Company Limited, 1989) pages i-xxix, 1-438. Price $79.50. ISBN 0 455 209324 4.

For those interested in analysis of fundamental equitable principles and predictions of their future developments, this book is both thought-provoking and informative.

Equity, Fiduciaries and Trusts is the edited publication of a series of papers presented at The International Symposium on Trusts, Equity and Fiduciary Relationships held at the University of Victoria, Canada, in February 1988. The authors are lawyers from Australia, Canada, England and the United States of America. This, combined with different specialisations and avenues of practice, results in a diversity of viewpoints. Such diversity makes for a stimulating examination of the legal and philosophical underpinnings of various equitable doctrines, and leads to conflicting predictions for future developments.

The opening chapter, by Professor Paul Finn, examines the fiduciary principle. It looks at the linkages between unconscionability, good faith and the fiduciary principle; Professor Finn argues that the standards they impose are progressive and have common elements. This leads him to categorize the fiduciary principle as a sub-species of a more general over-arching principle concerned with proscribing advantage-taking in relationships. In identifying factors which indicate the appropriate application of one doctrine rather than another, his treatment of good faith is compelling.

Professor Finn argues that, at present, standards of good faith are exacted via an eclectic collection of specific doctrines. These doctrines lack any unifying principle and are constrained by the remedies known to each particular doctrine. The ever growing stream of claims on fiduciary law, with its ample and flexible remedy system, is a consequence of this. He concludes that this drive for the best remedy is distorting the ambit of both good faith and fiduciary obligations. As a solution, he proposes a unifying principle for good faith, predicated upon the 'reasonable expectation' of the other party, and linked with a flexible remedy system.

From this theoretical approach to principles and doctrines, the next two chapters pursue the related but more practical concern of remedies. From its inception, equity has been concerned with providing remedies where the common law proved inadequate. This remains its concern.

The Honourable Mr Justice Gummow, of the Federal Court of Australia, and Associate Professor Timothy Youdan, of Osgoode Hall Law School, examine complementary aspects of the principles governing quantification of damages resulting from breach of fiduciary duty. Gummow J. excludes from his consideration the liability of a defaulting fiduciary to account for personal profits. Within this self-imposed restriction, he seeks analogies in trust law, tort and the law of contract for the liability of fiduciaries. His declared objective is not to propound solutions, but to indicate the prospects for development of the law. Nevertheless, he achieves a measure of both, and also shows that formalism in legal thinking is not entirely dead.

Associate Professor Youdan's approach is quite different. He examines existing authorities relating to the liability of a fiduciary for improper gains and concludes that they fail to establish any generally applicable principles for distinguishing between personal and proprietary liability. His proposed solution is the adoption of a principle which allows a proprietary remedy only when the fiduciary's gain is obtained at the expense of the principal. He concedes this deceptively simple statement requires considerable explanation and justification, and these he seeks to provide. The debate concerning the ambit of personal and proprietary remedies, and the role of the constructive trust, is a contentious one. The issues raised reappear in later chapters of this book in the context of the doctrine of unjust enrichment. All these chapters provide illuminating contributions to the debate; in addition, the unanswered questions they raise will stimulate further debate.

The next three chapters deal with trusteeship of superannuation funds and pension plan trusts. There is very little case law in this area. Faced by this dearth of precedent, Professor Robert Austin of Sydney argues, in Chapter 4, that the administrators of such funds should be subject to the principles of the general law of trusts and fiduciary duties. He considers the adoption of this standard would achieve a desirable balance between the unrestricted bargaining allowed by freedom of contract, and the imposition of inflexible standards which statutory prescriptions may bring. This comment is interesting in itself, in the light of the ever-increasing move to statutory intervention in Australia. Professor Austin seeks to show his choice is justified by looking at the way in which such general

fiduciary principles would operate in several notable problem areas. A practical example of these problems, and their resolution in accordance with fiduciary principles, is provided in Chapter 6. The Rt Hon. Sir Robert Megarry gives an insider's view of his decision in *Cowan v. Scargill*,[1] a case concerning the investment of pension plan funds. This is one of very few decisions in the area and, because it supports the application of fiduciary principles, it adds further fuel to the debate.

Still on the subject of superannuation funds, a contrary viewpoint is put forward in Chapter 5 by Ms Mary Louise Dickson Q.C. She argues that trust law provides an inadequate solution to one of the major problems with superannuation funds, ownership of the surplus. This is obviously a question of some import, as thousands of billions of dollars are at stake. This factor alone places a certain perspective on the problem. Ms Dickson examines the legislation and jurisprudence of several common law countries and concludes that the traditional approach taken by all of them is questionable. She argues that, from a business point of view, it is neither appropriate nor desirable to determine this question by applying fiduciary principles to the interpretation of relevant documents. This is because frequently such documents are drafted without regard to the issue. Rather than an approach based on fiduciary principles, she argues for an approach based on the assumption that a superannuation scheme is a commercial, contractual arrangement between employer and employees. Whatever one's viewpoint, these discussions throw into sharp focus the current deficiencies in the law applicable to trustees of superannuation funds.

From superannuation funds, discussion moves to the subject of business trusts. In Chapter 7 Mr Sheldon A. Jones, of Dechert Price & Rhoads, Boston, considers the Massachusetts business trust. Mr Jones lists as one of its disadvantages the failure of people from outside the United States to understand the vehicle. His paper goes a good way towards remedying this: he looks at the history, structure, inter-relationship of the parties and practical uses of the Massachusetts business trust. Chapter 8 is a return to more familiar territory, at least for Australian lawyers. Mr Maurice C. Cullity Q.C. details the legal issues arising out of the use of business trusts in Canada. It seems that the use of such vehicles was far more common in Australia than it has ever been in Canada. This was undoubtedly for tax reasons, but as a consequence perhaps Australia provides a more comprehensive and well-defined body of law upon which to base predictions for future directions.

A wider consideration of constructive trusts and unjust enrichment by Professor David Hayton of King's College, University of London, appears in Chapter 9; this is followed by an equally substantial commentary by Professor Marcia Neave of the University of Adelaide. These chapters are particularly relevant and illuminating to Australian lawyers in the light of recent judgments of the Australian High Court. Their relevance for lawyers from other jurisdictions stems from different considerations: Canadians will, no doubt, be looking for refinements to their existing doctrine of unjust enrichment; English lawyers will be watching the reception and development of these concepts for any recommendations that they be adopted into English law. The two chapters are valuable contributions to the debate, made more valuable because the viewpoints expressed are in spirited disagreement on several points. Arguments put forward by Professor Youdan in Chapter 3 express yet another viewpoint on some of the same issues.

Professor Hayton argues that constructive trusts and the doctrine of equitable proprietary estoppel provide a satisfactory basis for establishing proprietary liability. Not only this, but he sees those doctrines as providing a more flexible system of remedies than unjust enrichment. He concedes, however, that some categories of constructive trusts may need to be developed and refined to accommodate the underlying rationale of remedying unjust enrichment.

Professor Neave's paper focuses on one theme of Professor Hayton's paper, the 'common intention' constructive trusts utilised in the resolution of family property disputes. She begins by asking what the outcome should be. This seems particularly pertinent, considering equity's traditional concern to moderate the harshness of the common law. She analyses the different approaches discussed by Professor Hayton, and concludes that the doctrine of unjust enrichment could adequately cope with existing categories of problems, and would have the major advantage of being able to deal with new fact situations. Professor Neave goes one step further, and briefly considers how the notion of unconscionability currently favoured by some members of the Australian High Court relates to this current debate.

Chapter 11 contains a comprehensive consideration of the comparative taxation of trusts in four common law countries. Given this ample factual background provided by Mr Wolfe Goodman Q.C.,

Mr John Tiley's commentary provides a stimulating response: he asks a series of thought-provoking questions, some of which he answers, although by no means all.

The final four chapters of the book are perhaps the most indicative of the thrust and purpose of the whole work: they provide an examination of new directions in equitable doctrines. Professor William Fratcher, of the University of Missouri-Columbia, looks at the equitable doctrines of several common law countries as they relate to home purchases. His analysis looks backwards in time as well as forwards, perhaps to convince us that equitable doctrines do develop, albeit slowly and cautiously. The other three chapters look at current developments on a country-by-country basis, without restricting coverage to any particular equitable doctrine. Mr J. D. Davies considers new directions in equitable doctrines in England and Wales; Mr J. R. F. Lehane analyses recent Australian developments; Professor Donovan W. M. Waters concludes with the Canadian contribution, including a particularly interesting discussion of the relationship between the aboriginal peoples and the State. These contributions all serve to emphasise that the last twenty-five years have seen striking developments in several fundamental equitable doctrines. These developments have occurred in different ways and at different rates in each of the common law countries. This feature provides fertile ground for a comparison of the relative merits of particular fundamental principles. It also, perhaps, improves the value of predictions for the future directions of such equitable doctrines.

This potted version of the book's contents gives some indication of its emphasis and strengths. Given these strengths, it is perhaps unduly critical to suggest that the book seems to lack a central theme: the title of the book indicates a breadth of subject matter that requires some overriding theme to give it focus. The limiting concept of future directions in equity is not followed through sufficiently strongly by each of the contributing authors to allow it to become that unifying theme.

This aside, the book is recommended as one which will further stimulate the already lively debate surrounding the law relating to fiduciaries and trusts. It can be expected to have particular appeal for academics, advanced students of equity and contract, and others interested in anticipating the impending directions of equity's influence.

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[1] [1985] Ch. 270.

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