Fiduciary obligations and Finn's Law

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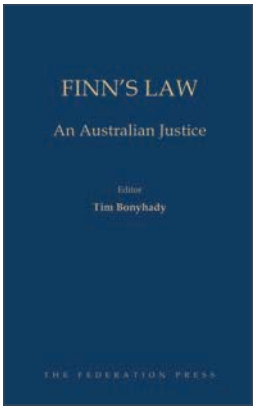

The following address was delivered by the Hon Keith Mason AC QC at the launch of *Fiduciary Obligations and Finn's Law* on 9 February 2017.

I first met Paul Finn in September 1970 in London. We had both enrolled to do a Masters in Law and chosen Restitution as one of our subjects. Our lecturers included Peter Birks who was then on his very first teaching post, at University College, London. He would later become the Regius Professor at Oxford.

There were five Australians in a small cohort of students, the rest being mainly from England. As a topic was discussed one of the Aussies would occasionally suggest: 'There is an Australian decision on a similar point, if you are interested.' But not Paul Finn, if my memory serves me. He seemed at the time to be strangely reluctant to talk about things Australian.

I thought at the time that this could have been the shy introversion common to Queenslanders from that era. But Paul has never been shy and his reticence in contributing antipodean legal anecdotes seemed to be more broadly sourced. His earlier legal studies appeared to have led him to believe that it was always safer to go back *beyond* the sailing of the First Fleet. Back to the time when judges enunciated moral and political principles more than working mechanically with case law and worrying about judicial hierarchies. Back to the days of Vaughan CJ who in the age of Charles II remarked:

> I wonder to hear of citing of precedents in matter of equity, for if there be equity in a case, that equity is an universal truth, and there can be no precedent in it; so that in any precedent that can be produced, if it be the same with this case, the reason and equity is the same in itself; and if the precedent be not the same case with this it is not to be cited.'

I formed the impression that Paul, the young graduate student, had arrived at the view that some dark cloud had descended over the common law of both England and Australia in the previous two centuries. If a nineteenth or twentieth century case was raised for discussion by Birks, Paul repeatedly challenged him with a variant of the following question: 'But isn't this **really** just what Lord Hardwick was getting at in 1750 in *Earl of Chesterfield v Janssen?*'

This approach was far from mere antiquarianism and it would endure into Finn's early scholarly publications. In his *Finn's Law* chapter about *The Equitable Duty of Loyalty in Public Office,* Justice Gageler writes (p 127):

> The younger and more doctrinal Finn eschewed attempts to find higher truth in legal labels attached to categories of relationship; he espoused instead the importance of identifying the source and content of particular equitable obligations.'

We now learn from these two books that I am privileged to be launching today that, before Paul had even finished undergraduate studies in Brisbane, he had read all of the company and partnership cases in all of the English Reports. This alone would have encouraged the discernment of open-ended, overtly moralistic bases for legal principles.

I have to admit that Paul Finn's youthful seminar references to Lord Hardwick and to principles that were equitable spelt with a lower-case 'e' sounded very strange to both me and the late Bill Caldwell whose legal education had likewise been at Sydney Law School. Yet it is due in significant part to Paul's scholarly influence over the intervening decades that it is now entirely orthodox to see things this way. And likely to continue to be so. If you do not believe me, read both the *AFSL Case* on change of position and the book on *Unjust Enrichment* recently co-authored by our latest High Court justice. Justice Edelman and Professor Bant open with a quotation from Lord Mansfield who observed (in 1774) that:

> ...the law ... would be a strange science indeed if it were decided upon precedents only. Precedents serve to illustrate principles, and to give them fixed certainty.

A decade ago this approach uttered by this dangerous fusionist would have been branded as 'top-down reasoning' in some circles. But few things last forever in the law.

Now when I used the expression 'dangerous fusionist' I was, of course, referring to Lord Mansfield, not Justice Edelman. That said, I for one will not complain if his jurisprudence continues to trend in this direction. Others may do so, but I **never** criticise the work of High Court justices.

Paul Finn's *Fiduciary Obligations* was originally published in 1976. It was the product of a Cambridge PhD embarked upon immediately after the London Masters. The book filled a huge gap because fiduciary obligations had escaped sustained attention by legal commentators, unlike trusts and equitable remedies.

But in a deeper sense, the work was and remains almost unique in working seamlessly across common law and equity boundaries, in crafting coherence from

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Fiduciary Obligations and Finn's Law L to R: The Hon Keith Mason AC QC, The Hon Paul Finn, The Hon James Allsop AO, chief justice of the Federal Court and Professor Stephen Bottomley.

chaotic categories, and in straddling private and public law. It extrapolated and where necessary reconciled common themes across a range of different conceptual boxes such as directors, trustees, executors, public officers, donees of powers, liquidators and receivers. As Paul explains in the Preface to the original edition:

> Insofar as a seemingly amorphous mass of case law has permitted, I have attempted to outline the general principles and rules which inform judicial supervision of fiduciaries. Consequently, I have not concerned myself with presenting a description of the possible fiduciary incidents of particular legal relationships such as principal and agent or trustee and beneficiary. Indeed, in my view, these 'incidents' can only be understood properly after one first divines the purport and nature of Equity's regulation of fiduciaries. And thus one must go back to the general rules and principles.

The public law analogies that were only touched upon in Finn's early writings would become springboards for much of his academic and governmental work after his return to Australia. And the historical, contextual research that this entailed would bring his scholarship away from the ivory towers of Oxbridge into the more realistic dust and dirt of governance in Australia. None the worse for that!

In its ground-breaking approach to legal doctrine, *Fiduciary Obligations* had similarities with Goff & Jones, *Law of Restitution.* The first edition of that work had been published less than five years before Paul embarked on his PhD under the supervision of one of the co-authors, Professor Gareth Jones. Since, however, Paul's *primary* focus in his early writings was upon principles we (from Sydney at least) have been conditioned to think of as inherently equitable with a capital E, Finn (unlike those members of the 'restitution industry' who worked in similar manner but a different field) would not be attacked for trying to appropriate parts of the law marked 'Equity! Intruders Keep Out'.

As we are reminded in *Finn's Law,* Paul's teaching, networking, writing and international influence as a scholar-judge would spill beyond fiduciaries, to fields undreamt of by his beloved Lord Hardwick, areas such as public corruption, fair dealing in contract and native title. Paul's abiding concern for practical fairness and workable yet principled outcomes would help foster a distinctive yet eminently exportable Australian Equity jurisprudence. It would focus on unconscionability and remedial flexibility, particularly in the field of proprietary remedies such as the remedial constructive trust and lien.

These Australian developments, which had themselves been launched, endorsed and promoted in leading High Court decisions penned by Justices Mason, Deane and Gummow, would challenge Peter Birks' hard-edged taxonomies that have gained acceptance in the English Courts. But thanks to Justice Finn's judicial *magnum opus* in *Grimaldi v Chamelion Mining NL,* we have seen in the 2014 *FHR European Ventures* decision of the United Kingdom Supreme Court a major retreat by the English appellate courts when they *dis*-endorsed Peter Birks' pin-up case of *Lister v Stubbs.* I cannot refrain from observing how ironical it is that Paul Finn's academic and judicial scholarship that began by fawning old-English ideas would (as it developed and matured in these hardier climes) become a vehicle for exporting the best of Australian private law back to England and to other parts of the British Commonwealth.

Why *Fiduciary Obligations* did not proceed to later editions is a much-debated mystery. I suppose we must accept Paul's word for it that he had simply 'moved on'. But to give him his due, Paul has also been rather busy between the 1976 and 2016 iterations of *Fiduciary Obligations.* His years at

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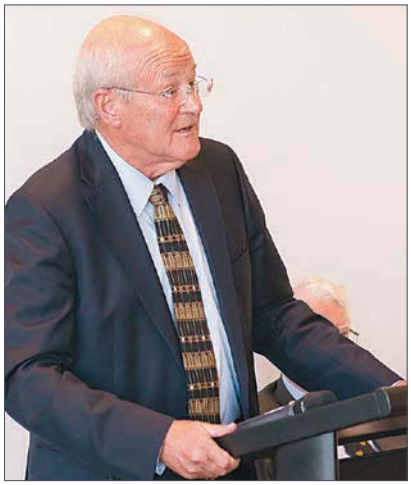

the Australian National University were highly productive in every sense of the word, including moulding a generation of disciples some of whom have returned the compliment by contributing to the *festschrift* that is *Finn's Law.* There were also the eight-volume series of '*Finn on*' essays that emerged from the celebrated round of seminars at ANU conducted according to the now internationally recognised 'Finn Rules'.

And, there were the outstanding contributions in the Federal Court that included the *Akiba* native title decision that is reviewed in Justice Michael Barker's chapter in *Finn's Law.* This decision rested upon a wide grasp of case law and legal theory, an understanding of historical context, and (most of all) a willingness to proceed courageously from general principles to fair, workable and authoritative outcomes. We see the spirits of Lord Hardwicke and Lord Mansfield in these and other developments in the Finn jurisprudence.

Finn's writings, mainly judicial, on the topic of fair-dealing in commerce are analysed in the chapter *'Conscience, Fair-dealing and Commerce'* by Chief Justice James Allsop. In the chief justice's words, this contribution reflected Paul Finn's 'recognition of the need to conform rules to principles and to develop principles, and therefore rules, from stable foundations built on practical, honest decency.' (*Finn's Law,* p 92) This chapter also emphasises how ideas from law, equity and statute have been blended in recent years in our High Court jurisprudence. Once again, an aspect of Finn's scholarship.

But I must step back from lauding Paul Finn's *judicial* work because I am under strict instructions from Mark Leeming and the other people from The Federation Press not to encourage subscriptions to any law reports or other publications by LexisNexis or The Law Book Company. The reality is, of course, that you cannot and you should not ever separate the judge and the scholar, or disconnect him or her from an evolving life experience. And in the particular case of Paul Finn, it is hard to think of anyone who has done more to encourage and participate in dialogue between the academy and the bench, and across the jurisdictions. This is not a universal phenomenon, as anyone who has familiarity with the English legal establishment would know.

Fiduciary Obligations has long been the 'go to' work on the topic for teachers, students, scholars and judges. It favours both those prepared to read it a single sitting and those wanting to dip in for detailed analysis. Getting to it has, until now, been impeded by its unavailability. It has the distinction of being the text most often stolen from Cambridge University's law library. When, only months ago, I mentioned casually to Professor Simone Degeling that I owned a copy, she begged to borrow it, and certainly not for the annotations I had added over my years at the Bar and Bench.

I told Simone to save her pennies and buy the new production when it was launched today.

Cambridge undergraduates will no longer risk blighting their careers by a larcenous act that could have given their forebears a free passage to New South Wales. The unavailability of *Fiduciary Obligations* has now been remedied in the productions that I am honoured to be launching today for which The Federation Press deserves genuine praise.

Fiduciary Obligations comes with a modern Introductory Comment by Paul himself, a Preface by Sir Anthony Mason, and the reproduction of two of Paul's many extra-judicial contributions on the topic. These are an article on *The Fiduciary Principle* that first appeared in 1989 and another, called *Fiduciary Reflections,* that was published in 2014. The latter tracks developments in Paul's thinking and scholarship on this topic over the past forty years as well as its reception into law.

Professor Sarah Worthington's chapter in *Finn's Law,* called '*Fiduciaries: Following Finn',* will also enable academics and serious practitioners to survey the reactive academic and judicial scholarship in the intervening years. More importantly, it will assist anyone keen to anticipate the ongoing trajectory of High Court fiduciary jurisprudence over the next decade or so.

Finn's Law: An Australian Justice, edited by Professor Tim Bonyhady, is much more than a *festschrift* provided by a cohort of 'Finn groupies'. I know that such an expression is hardly respectful of five distinguished professors of international repute, and judges from the High Court, the Federal Court of Australia and the High Court of Justice of England and Wales. But I hope you and they will readily understand the point I am making.

In their chapters, Tim Bonyhady and Justice Ross Cranston offer us details of Paul's scholarly life in progress, amply reinforcing my thesis that truly great jurists are those whose beliefs change and

develop during their lifetime, perhaps because they are perceptive enough to realise (with appropriate humility) that their own life experiences and personal networks offer continual stimulation.

The remaining contributors to *Finn's Law* provide critical up to date snapshots of several key doctrines, drawing attention to Australian distinctiveness and Paul's special contribution to this state of affairs.

I would specially mention Associate Professor Pauline Ridge, who discusses participatory liability in its various forms. Pauline charitably describes the High Court decision in *Farah Constructions* as 'unfinished business' and she too dilates upon Paul's multi-faceted encyclopedia in *Grimaldi.* In this context, she identifies three hallmarks of equitable judicial method espoused by our friend, hallmarks also clearly evidenced in such recent decisions of the New South Wales Court of Appeal as *Heperu* and *Fistar.* These Finn hallmarks are:

- The exposition of doctrine in terms of its basal principle, organising ideas, and policy underpinnings;
- The discretionary and holistic application of equitable principle and determination of equitable remedy; and
- An openness to principled 'fusion' of common law and equity.

Together, these two books will enable the discerning academic or practitioner to survey large swathes of law. The eminence of the various contributors allows us to be sure that we are shown where the law has come from, where it is going, and where the law in Australia is converging or diverging from that of overseas.

Each book shows what vast strides have been made in the coherent understanding of legal and equitable principles, the magnetic interplay between statutory and judge-made law, and the convergence of public and private law discourse that has taken place in the 46 years since Paul Finn first slipped shyly into postgraduate studies at London University.