EQUITY, RESTITUTION AND FRAUD †

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Australia, it would seem, is the last bastion of 'equity' as a separate area of law and legal study. While in Britain equity is being absorbed into a larger law of civil obligations, and in New Zealand the idea of 'fusion' is taken sufficiently seriously to make any sharp division between law and equity meaningless, Australian jurisprudence remains resolute in its defence of the distinctiveness of equity as a meaningful legal category. This defence, so ably carried on by works such as *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*,[1] has now been joined by *Equity, Restitution and Fraud.* While 'restitution' — often regarded with hostility in Australia[2] — has crept into the title, Associate Professor Glover's book remains one much concerned with the *law of equity.*

The book has two organising themes. The first is that of 'fraud' or equitable wrongdoing and the responses to such wrongdoing. The book's subject matter is thus the principal equitable doctrines concerned with what has historically been called equitable fraud, but less opaquely breach of equitable duty. The book's principal chapters deal with breach of fiduciary duty, unconscientious dealing and undue influence, and breach of confidence. The remaining two chapters deal with equity's responses to these categories of wrongdoing.

The second theme is a methodological one that also explains why the book is concerned with only some, but not all, civil wrongs. In the author's view, equity must be understood and maintained as a separate body of law: 'Equity must be maintained as a separate system, with its own concepts and doctrines, if it is to continue to function as the law's corrective. The purity of equity will be lost if its doctrines are applied as rules, rather than as the expression of underlying principles'.[3]

The first three substantive chapters are devoted to fiduciary relationships. Chapter two is concerned with the existence of a fiduciary relationship. Chapter three is concerned with the scope of the relationship and Chapter four with breach of fiduciary obligations. Two aspects of the author's treatment of the fiduciary concept stand out. First, in keeping with his articulation of equity's methodology, he rejects not only the possibility of developing a workable definition of a fiduciary relationship, but also the desirability of doing so. Drawing on the linguistic philosophy of Ludwig Wittgenstein, the author rejects the search for a common

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† John Glover, *Equity, Restitution and Fraud*, Lexis Nexis Butterworths (2003).

[1] R P Meagher, D Heydon and M Leeming (4th ed, 2002).

[2] *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516.

[3] Glover, above n †, 12.

element, in favour of a 'family of resemblances' approach. On this approach, a fiduciary relationship will be found where there is an 'acceptable degree of resemblance'[4] to other fiduciary relationships. The boundaries of such an approach are the 'limits of coherent analogy'.[5] Thus, while it is possible to identify recurring features (those identified by the author being undertaking, property, reliance, and power), the determination that a relationship is a fiduciary one does not require all (or perhaps even any) of these factors to be present. Rather, it is a matter of deciding whether the relationship in question resembles a fiduciary relationship. 'Deciding which resemblance is the most salient, or outstanding, involves judgment.'[6]

The linguistic difficulties inherent in a language-based endeavour such as the law must, of course, be accepted. One can also accept, at least as a matter of history, the more open-textured nature of equitable doctrines. However, as with post-modernist theory generally, an approach that denies our ability to articulate clearly a common understanding of a particular concept is ultimately self-defeating and pointless. If language and meaning are as contingent as Glover suggests, the very idea of law as a system of commonly understood and agreed upon rules and principles is futile. In any event, in the case of the fiduciary relationship, the fact that there seems to be sufficient agreement on what a fiduciary relationship is to permit the recognition of a family resemblance suggests that the difficulty lies not in general concepts per se. Rather, the problem of definition may lie in the over-extension of the fiduciary concept.

The second noteworthy feature is that that the author seems to accept that the fiduciary relationship gives rise to an identifiable core of duties. Thus, citing *Bristol and West Building Society v Mothew*,[7] the author concludes that 'disloyalty and unfaithfulness typify all breaches of fiduciary duty'.[8] While this is a relatively unremarkable view, it may not sit altogether comfortably with Glover's view on the impossibility of defining a fiduciary relationship. If, as he contends, it is neither possible nor fruitful to seek to identify the essential features of a fiduciary relationship, it is difficult to see how one can accept the idea of core duties. If the duty common to all fiduciary relationships is one of loyalty, this tends to suggest that the essence of the fiduciary relationship is loyalty. To put the matter another way, if a relationship does not call for loyalty, there is thus no basis for imposing duties of loyalty, and if there are no duties of loyalty the relationship cannot be called fiduciary. Loyalty is thus the common element.

Chapter 5 deals with the doctrines of unconscientious dealing and undue influence. In keeping with the book's theme of equitable wrongdoing, these doctrines are presented as being concerned with 'transactional wrongdoing'[9] and with preventing

[4] Ibid 43.
[5] Ibid 45.
[6] Ibid.
[7] [1998] Ch 1, 18.
[8] Gover, above n †, 169.
[9] Ibid 281.

'exploitative conduct'.[10] From an historical perspective, the derivation of these doctrines from the ancient jurisdiction of fraud is undoubtedly correct. What is less clear, however, is whether these doctrines are actually concerned with wrongdoing, at least in the same sense in which a breach of fiduciary duty or breach of confidence is wrongful.

Although there are occasional statements labelling a person with influence or who deals with a person with a special disadvantage as a wrongdoer, active wrongdoing is a requirement of neither doctrine. Thus, for example, in the recent decision of *Niersmans v Pesticcio*, the English Court of Appeal stated:

> Although undue influence is sometimes described as an 'equitable wrong' or even as a species of equitable fraud, the basis of the court's intervention is not the commission of a dishonest or wrongful act by the defendant, but that, as a matter of public policy, the presumed influence arising from the relationship of trust and confidence should not operate to the disadvantage of the victim, if the transaction is not satisfactorily explained by ordinary motives ...[11]

What these doctrines are concerned with, as the author himself seems to acknowledge, is the protection of the 'reality of agreement'[12] in cases where, because of excessive trust or intellectual incapacity, the plaintiff cannot be assumed to have acted in his or her own best interests. Equity may well describe the defendant who takes the benefit of such a transaction as fraudulent, but it is difficult to attach the same implication of moral turpitude to such a defendant as attaches to one who breaches his or her fiduciary duty.

The final two chapters deal with equity's responses to the various wrongs discussed. Chapter 7 deals with remedies against 'primary wrongdoers' and includes a discussion of proprietary remedies, disgorgement, and equitable compensation. Chapter 8 deals with remedies against third parties. The principal focus here is liability for knowing receipt of trust property and 'knowing assistance' liability. The discussion in both chapters is fairly orthodox, although the author does persist with the label 'knowing assistance' despite its rejection by the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan*[13] in favour of 'dishonest assistance'.

However, the division of materials between the two chapters on the basis of whether the remedy is directed at the primary wrongdoer or a third party is more problematic. This division does not accurately describe the focus or effect of the remedies discussed in either chapter. Thus, as the author notes, the proprietary remedies discussed in Chapter 7 are mostly 'made against remote recipients'[14] rather than the primary wrongdoer, while the 'remedy' of knowing assistance

[10] Ibid 280.
[11] [2004] EWCA Civ 372 [20]. In respect of unconscientious dealing, see *Nichols v Jessup* [1986] 1 NZLR 226, 233.
[12] Glover, above n †, 280.
[13] [2002] 2 AC 164.
[14] Glover, above n †, 169.

discussed in Chapter 8 involves actual wrongdoing on the part of the assister. The difficulty with the organisation of these chapters seems to lie in a confusion of the questions at whom the remedy is directed and whether the liability being remedied is primary or secondary.

The continuation of equity as a distinct legal category based on the origin of its doctrines in the Courts of Chancery is a battle that was lost long ago. Whether the distinctive methods and style of equitable rules are sufficient to outweigh the taxonomic advantages of integrating equitable doctrines into a wider scheme of the civil law is the battle presently being fought. *Equity, Restitution and Fraud* is an interesting and competent addition to the arsenal of those committed to the defence of the island fortress of equity.