Book Reviews

INTRODUCTION TO THE LAW OF EMPLOYMENT by Alexander Szakats, 3rd edition, Butterworths, Wellington, 1988, liii + 435 pp. Reviewed by R P Boast*.

Dr Szakats' textbook is well known to labour law specialists. First published in 1975, we now have a third edition which takes into account the changes made by the Labour Relations Act 1987, as well as the many other developments since the publication of the second edition in 1981. The high standards of writing and scholarship set by earlier editions have been maintained and the book is without doubt an essential feature of any collection on New Zealand labour law.

The book is organised around the concept of the contract of employment, and proceeds with an analysis of the formation, contents, and termination of the employment contract. There are separate chapters on safety, health and welfare and a concluding chapter on "Incidental Issues", which is a discussion of a selection of policy questions, including the concept of a "right to work" and the need for a "labour code". As befits a textbook on modern employment law there is a detailed discussion of statutory modifications to the employment relationship, in particular anti-discriminatory legislation and the operation of the wage determination system of the Labour Relations Act. And although labour lawyers will always disagree as to the extent to which their subject is an aspect of public or private law, and as to the centrality of the contract of employment, Dr Szakats textbook abundantly documents the continued vitality of the contract of employment and its usefulness as an explanatory framework for virtually the entire corpus of labour law.

All writers on labour law face the peril of rapid statutory changes continually modifying their subject. The book was put through the press before the enactment of the crucially important State Sector Act, introduced at the end of 1987. Dr Szakats has, however, written a short Appendix which briefly summarises the effect of that legislation, and which also includes a brief analysis of important recent cases.

This is a reliable, scholarly and (as much as the subject will allow) an up to date text, suitable both for practitioners and teachers of labour law.

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THE COMMON LAW OF OBLIGATIONS, by P J Cooke and D W Oughton, London, Butterworths, 1989, xxxix + 568 pp (including index). Reviewed by C E F Rickett.*

The authors of this textbook were involved in establishing and teaching a common law course at Liverpool Polytechnic, and the book is part of the fruit of that endeavour. They state their objective as being "to present a coherent picture of the way in which the common law protects the expectation, reliance and restitution interests of plaintiffs."[1] They regret the fact that in most institutions where courses on "common law" or "obligations" are taught, the books used tend to be those written specifically for contract or tort (or restitution) courses, and which therefore fail to examine underlying principles - this text is intended to fill the gap.

The book has five sections. Section A sets the context, concluding that the pre-eminence of contract in its classical form - the form which is still dominant in the presentation (and definition) of contract law - owed much to an intellectual milieu which stressed individualism and economic liberalism. The inadequacy of this theoretical foundation is also exposed. Section B examines the principles of the law of obligations, focussing on the three interests identified above (corresponding roughly to contract, tort and restitution), and discusses also the issues of ascription of contractual responsibility, public policy and standards of liability. Section C discusses remedies and limitations. Section D examines the negation of liability, including a discussion of unconscionability. Section E consists of chapters devoted to specific areas, such as liability for defective products, defective services, and liability for statements.

The mammoth task set themselves by the authors is revealed in the eventual size of the book. Essentially, the work maintains a consistent pattern throughout, and is a very useful exposition of the central core of the common law of obligations.

Certain points can, nevertheless, be made. First, throughout the book much is made of an economic analysis of the various rules. Perhaps there is a place in a further edition for a short discussion of the principles lying behind this particular jurisprudential stance, especially as this is intended as a text for students who may not be familiar with it. Secondly, whether or not the Fuller and Perdue analysis of types of interests protected[2] - echoed strongly in an article by A S Burrows,[3] quoted by Cooke and Oughton in several places - is adequate as a foundation for an analysis of the law of obligations is not discussed, although it is assumed

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1 At v.

2 L L Fuller and William R Perdue Jr "The Reliance Interest in Contract Damages" 46 Yale L J 52, 373 (1936 and 1937).

3 A S Burrows "Contract, Tort and Restitution - A Satisfactory Division or Not?" (1983) 99 LQR 217.

throughout. Are there other ways of describing the common law of obligations? Thirdly, as one might expect, contract and tort take the lion's share of the authors' attention, and whilst there is a very good summary of the theoretical foundations of the law of restitution (particularly the view propounded by Birks), and some discussion of restitution in the remedies section, much more needs to be made of the boundaries between restitution on the one had, and tort and contract on the other. More could also well be made of the content of restitution.

These second and third points may well both be linked to two further observations. Is it possible to write a book on the law of obligations without including on equal terms the law relating to *equitable* obligations? Of course, if the subject is *defined* as common law, the answer has to be "yes". But possibly a redefinition is needed, particularly if judicial claims about "fusion" are to be taken seriously. A work simply on "The Law of Obligations" would naturally be an awesome text, but possibly the future in the law of obligations will continue to see a move away from textbooks dealing with specific types of obligation towards more panoramic works. A further question: what is the "common law"? Cooke and Oughton's book lacks considerably in any potential appeal outside England (other than to a few academics) because there is only minimal citation of other Commonwealth or American material - let alone discussion in the text itself of alternative substantive approaches taken. This is a book about English law. Assuming the validity of the general enterprise, a New Zealand academic or even practitioner might want to pursue a text on the New Zealand law of obligations. Faced with the general tendencies evidenced in recent New Zealand Court of Appeal decisions, the season may well be auspicious for such an enterprise. The strengths in Cooke and Oughton's text would need to be emulated, and the weaknesses avoided.

EQUITY, FIDUCIARIES AND TRUSTS, edited by T G Youdan, Carswell, Toronto, 1989, xxix + 438 pp (including index). Reviewed by C E F Rickett*.

This book presents in published form the major papers presented at "The International Symposium on Trusts, Equity and Fiduciary Relationships" held at the Faculty of Law of the University of Victoria in British Columbia in February 1988. It is unfortunate that there is no New Zealand contributor included, nor is there a chapter on "New Directions in the Employment of Equitable Doctrines in New Zealand" to complement those on England and Wales, Australia and Canada. Nonetheless, it is an important collection of contributions from many of the common law world's leading equity thinkers and writers; and many of the chapters included will merit careful attention from New Zealand academics, practitioners with an equity bias, and judges, because they deal with development in areas with

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which New Zealand courts are concerned, and in some of which New Zealand courts have shown considerable initiative.

The contributions of least interest in New Zealand are those on business trusts, which have not caught on here as in Canada or Australia, and a paper on the equity of redemption in the American context. Three chapters on pension fund trusts, one of which is a revealing discussion by Sir Robert Megarry of his decision in *Cowan* v *Scargill*[1], will be of some interest to those involved in the area, particularly for their comparative value.

The first three chapters are major contributions to the growing literature on fiduciary law. P D Finn's paper on "The Fiduciary Principle" is a seminal piece analysing the nature and content of a fiduciary by comparison with unconscionability and good faith. His purpose is to raise the question "whether the fiduciary principle is no more than a sub-species in the law, with its organising principle lying beyond it, not in it"[2], and he suggests that the fiduciary principle, properly understood, belongs to a family of doctrines informed by a common principle. There is, to my mind, no question that more thinking needs to be done in this area. There is too much abuse of fiduciary law in many sets of pleadings, even in New Zealand, as if pleading "fiduciary" is a way of inviting the judge to turn a magic key and thereby open a door into a room full of remedies of all sorts, simply waiting for a discretion to be exercised in their favour. A final question Finn asks is most pertinent:[3]

> Would the undue interest we currently have in the fiduciary principle be much diminished if the remedies we were prepared to make available in unconscionability and good faith cases, were liberalised, were permitted to relieve more effectively than they currently do, the wrongs which can flow from unconscionable or bad faith conduct?

Both Mr Justice Gummow and T G Youdan take up the issue of remedies. Mr Justice Gummow discusses monetary compensation for breach of fiduciary duty. In New Zealand there seems to be no jurisdictional problem in awarding equitable compensation, both as a result of statute : see section 16A of the Judicature Act 1908, as inserted by the Judicature Amendment Act 1988 -

> Where the court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance;

and as a result of judicial statements, particularly from our Court of Appeal, that equity and law are fused, and thus all remedies are available irrespective whether

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1 [1985] Ch 270.
2 At 55.
3 At 56.

the course of action is "legal" or "equitable": see most recently the statements of Somers J in *Elders Pastoral Ltd* v *Bank of New Zealand*:[4]

> There has always been a "fusion" in New Zealand. From the passing of ss 2, 3 and 4 of the Ordinance establishing the Supreme Court in 1841 superior Courts have had, and have exercised, all the equitable and common law jurisdiction which was available to superior Courts in England ... .

Of course, there may be no jurisdictional problem, but as Mr Justice Gummow's paper shows, this alone does not avoid a host of other issues. Interestingly, in discussing the issue of contributory negligence as relevant to equitable compensation, he refers rather critically to *Day* v *Mead*[5] as revealing a conceptual confusion over the foundational issue of "fusion". *Day* v *Mead* is fast being promoted as a decision of major significance for the new look law of obligations in New Zealand (and possibly for the demise of the equity/common law distinction per se?). More work will need to be done in this area.

T G Youdan's paper adds to the "personal versus proprietary remedy" debate. Two developments since the paper was written need to be mentioned. First, Professor Birks has reiterated his defence of *Lister and Co* v *Stubbs*[6] in his important case note on *Islamic Republic of Iran Shipping Lines* v *Denby*.[7] This is vital reading. Secondly, the Supreme Court of Canada has delivered judgment in the important case of *International Corona Resources Ltd* v *Lac Minerals Ltd*[8] where there is much material on the nature of equitable remedies in a fiduciary context.

Two papers discuss constructive trusts. D J Hayton examines the potential of the principle of unjust enrichment as developed and applied by Canadian courts. He suggests that the principle has considerable value as a satisfactory basis for monetary (or personal) claims founded on constructive trusts, but suspects that in proprietary constructive trust claims English courts will make increasing use of proprietary estoppel principles, even though[9]

> [w]here estoppel principles are applied not so as to perfect gifts of a specific share or a fair share of a house but so as to impose a charge on the house or a personal obligation to pay over a sum of money, then it seems that unjust enrichment principles should be regarded as the underlying basis of such liability.

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4 [1989] 2 NZLR 180, 193.

5 [1987] 2 NZLR 443.

6 (1980) 45 Ch D 1.

7 [1987] 1 Lloyd's R 367. See Peter Birks "Personal Restitution in Equity" [1988] 2 LMCLQ 128.

8 See the High Court judgment at (1986) 25 DLR (4th) 504 and the Ontario Court of Appeal decision at (1987) 44 DLR (4th) 592. The Supreme Court decision is unreported at the time of writing.

9 At 241.

Marcia Neave examines three approaches to family property disputes. She finds the English approach based on common intention and proprietary estoppel unsatisfactory, and argues vigorously for the straight out adoption of unjust enrichment. She suggests that the Australian "unconscionability" approach may indeed, as Toohey J himself opined in *Baumgartner* v *Baumgartner*,[10] simply be an unjust enrichment approach in different dress.

The recent Court of Appeal decision in *Gillies* v *Keogh*[11] has opened up the debate in New Zealand. Richardson J favours estoppel. Cooke P reasserts his "reasonable person in the shoes of the parties" approach. What this decision will mean for New Zealand equity jurisprudence - for, of course, even if statute does provide for de facto situations, there will be other relationships still demanding a judicial determination - must be assessed in the light of similar developments in other jurisdictions. The papers by Hayton and Neave are important as contributions pertinent to this assessment.

Two papers present masterly discussions on issues in the taxation of trusts. The last three papers are discussions of developments in equitable doctrine. J D Davies discusses developments in the law of trusts in England and Wales, and focuses accordingly on matters of knowledge and notice, undue influence, part performance, estoppel and unconscionability. Whilst he welcomes the new life being witnessed in English equity jurisprudence, he issues a warning which needs to be heeded as much in New Zealand as in England:[12]

> ... But Equity must always be able to resist the charge of being palm tree justice. Broad concepts such as unconscionability, while undoubtedly of use, are also easy to abuse. The broader the rationale, the greater the danger ... . Unconscionability may be the ultimate rationale for equitable intervention in many areas and unconscientious use of the title a convenient way of expressing it, but criteria are still needed to keep uncertainty within bounds, in respect both of the grounds of intervention and of the remedies that will follow, though I believe that predictability of the grounds is more important than predictability of the remedies.
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> Equity will need however to be fully conscious of what it is doing if it is to be successful in its present-day role. Confusion will follow if it is sought to conceal that its action is sometimes remedial. Judges can be reluctant to admit this. This reluctance may reflect the more conservative views favoured a generation ago, when it seemed to be felt that reform was the business of the legislature alone, but may also reflect unease at the very broad statements justifying intervention such as those made by Lord Denning MR. What is needed is to see whether there is an acceptable middle ground here.
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> To identify this middle ground there will, however, have to be more explicit consideration by the courts of Equity's role than it has yet received. The danger in

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10 (1987) 62 ALJR 29.
11 [1989] 2 NZLR 327.
12 At 391 (footnotes omitted).

> England is that we may try and experiment with substantive changes without thinking sufficiently about the methods through which they are best achieved ....

Australia has been the home in recent years of some of the most energetic developments in equity jurisprudence. J R F Lehane examines the leading decision on relief against forfeiture - *Legione* v *Hateley*[13] - and concludes that although there is a greater readiness among courts to interfere in bargains by resorting to notions of unconscionability, the method adopted is "soundly based and reflect[s] the way in which the principles of equity have traditionally evolved".[14]

Donovan Waters's paper on Canadian developments, whilst making some reference to developments in unjust enrichment and unconscionability, is of particular interest in New Zealand because he examines from the perspective of an equity lawyer the use of the fiduciary principle in cases between the Indian peoples and the Crown, especially in *Guerin* v *R*[15] and *Kruger* v *R*.[16] His conclusion is that the principle per se is inadequate to deal with the nuances of the problem, and thus there needs to be more specific pronouncements by either the legislature or the courts. Some of these comments are most pertinent to the New Zealand situation since *New Zealand Maori Council* v *Attorney-General*.[17]

Overall, then, there is much of interest and indeed importance for New Zealand in this well-produced book.

THE VISUAL ARTIST AND THE LAW by Shane Simpson,The Law Book Company Limited, Sydney, 1989, 2ed, xix + 311 pp (including glossary, appendices, and index). Reviewed by A H Angelo*.

The purpose of this book is stated to be "to provide artists with information that is basic to their professional life so that they can better avoid the trauma of legal dispute and better recognise when they need expert legal advice". There is little doubt that the book, which is substantially bigger than its 1982 first edition, fulfils its purpose. It is a mine of readily accessible information on its subject area which is the legal environment of visual artists. The book is easily read.

Artists who really wish to protect their interests should have a copy of this book. Equally there can be no doubt that this is a book that will be of interest to most lawyers. Not only because according to the author "most lawyers do not

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13 (1983) 152 CLR 406.
14 At 410.
15 [1984] SCR 335.
16 [1986] 1 FC 3.
17 [1987] 1 NZLR 641.
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recognise that artists have special legal needs" but also because increasingly lawyers have interests in the visual arts as common elements of their personal and professional environment.

The Contents list shows the range of the book: Principles of Contract, Studio Sales, Artist-Dealer/Gallery Relationship, Commissioning of Artworks, Loan of Work for Public Exhibition, Principles of Copyright, Applied Designs, Moral Rights of the Visual Artist, Droit de Suite: the Artist's Royalty, Restrictions on the Freedom of Expression, Artists Employed in the Community, Photography, Fabric Designers, Illustrators, Printmakers and the Prints, Arts Organisations, Business Structures, Duty of Care, Insurance, Taxation, Sponsorship, International Protection of Cultural Material.

There are many areas where the law is inadequate in its protections from the artists' point of view. It is therefore interesting to have a commentary on the application of the law in the specific context of the visual artist's world in many of the issues of current controversy in New Zealand.

The text is clear and practical both in terms of advice and in the simple precedents presented for artists' use. When an art work is bought or commissioned can it be altered by the new owner? Can it be reproduced by the owner for greeting cards, for the cover of the book? The question of the difference between the material object and the right to reproduce it, is one of the many topical issues dealt with in this book.

The text is an Australian one but, by reason of its generality, its comparative approach, and the close relationship of New Zealand law to that of the Australian jurisdictions, the text is equally valuable in the New Zealand situation.

The book is well presented and very well balanced in its presentation of substance over the great range of topics; it is also, in general, well presented technically.[1] This is a book to read. If it is important that visual artists read it, it is at least as important that lawyers should. It is therefore a heartily recommended addition to the bookshelf.

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1 A few typographical errors were noted, eg pages x and 305. Mauritius has a National Monuments Act 1985, and Niue has sections 645 to 653 of the Niue Act 1966 to deal with antiquities - it might be queried whether they fulfil the criteria for inclusion in Appendix B, 305.

THE NEW ZEALAND FOREIGN AFFAIRS HANDBOOK, by Steve Hoadley, Oxford University Press, Auckland in association with the New Zealand Institute of International Affairs, 1989, xiv + 176 pp. Reviewed by A H Angelo*.

In the Preface it is stated that this book was written to assist readers interested in New Zealand's foreign affairs in three ways:

> as a reference book for those searching for particular facts,
> as a guidebook for those wanting an introduction to the subject,
> as a textbook for those embarking on a study of the issues.
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> The book begins with a survey of New Zealand's international role, interests and policies. It proceeds chapter by chapter to history, diplomacy, aid, trade, capital flow, defence, immigration and cultural exchange. It then describes foreign policy decision making and administering institutions, the parties and groups that influence them and the study centres and media that analyse and report on the foreign policy process. Each chapter begins with an overview to put the material into context and to indicate where public debate or controversial interpretations are to be found. Read together, the overviews provide a concise introduction to New Zealand's foreign affairs and policies.
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> Figures, tables and documents amplify the text. A detailed table of contents and an index are provided to guide readers searching for particular facts. Notes will assist those doing more extended research. Throughout, the author has attempted to draw together scattered material and present it in an orderly, accessible fashion. The result is to be judged not on its depth, but on its balance, reliability and convenience.

That is a very fair description of the book and what it achieves. Judged from the point of view of this reviewer's interests and likely use of the text it has more than adequate depth, it is balanced and reliable and it is very convenient. There is a good index, there are useful tables and, where appropriate, extracts from key documents relating to New Zealand foreign affairs.

As a matter of detail and again reflecting the particular interests of this reviewer the bare reference to the State Services Commission in a text which does deal with the constitutional system of New Zealand and the structure of its government is probably not adequate and especially not in the foreign affairs context given the role that the States Services Commission has in respect of Niue and Tokelau. Equally, in the historical overview and chronology of formative events 750 to 1 January 1989 it is noted that in 1925 "Britian transferred the Tokelau Islands to New Zealand". This is in fact inaccurate. What was transferred by Britain was the administration of Tokelau. This was done under an Order in Council of 1925 which was effective from 11 February 1926. Tokelau was subsequently transferred as a territory to New Zealand by a 1948 Order in Council

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which had effect from 1 January 1949 with the coming into force of the Tokelau Act 1948.

The United Nations Committee on Decolonisation is, according to the index, referred to only on page 21 and that is in the context of New Caledonia. The precise relationship of Tokelau to metropolitan New Zealand is not apparent from this volume and it would have seemed appropriate to have a sentence or two somewhere describing specifically the relationship of Tokelau to New Zealand and the place of the United Nations Committee on Decolonisation in that relationship. Tokelau watchers will be interested to note that Apia (the High Commission presumably) is listed as a diplomatic post for Tokelau. The practice of some departments in Wellington for administrative purposes is to list the Office of Tokelau Affairs (distinct from the New Zealand High Commission in Apia) in Apia as a diplomatic post for the purposes of Tokelau.

Of course none of this minutiae should or will detract from the usefulness of this text for government officials, people in professional practice and the public in general.

This is one of those books that should be read and referred to by all New Zealanders as a matter of general information about themselves and their country. It can be wholeheartedly recommended as a useful and compendious reference text to all those with an interest in or involved in any way with, foreign affairs matters, be it from a business, public international law or human rights angle.

This text is up to the minute. It deals with the restructuring of the Ministry of Foreign Affairs and the Ministry of External Relations and Trade. It is a very accessible and contemporary statement. The author and the publishers are to be congratulated on the production of this book. It is to be hoped that in the fullness of time as the data is overtaken by current affairs that there will be future equally useful editions.