

Book Reviews

NEW ZEALAND'S INTERNATIONAL TAXATION by G A Harris. Oxford University Press, Auckland, 1990, xvi + 456pp (including index). Reviewed by L J Brown.*

Mr Harris's recent work on International Taxation is a welcome addition to a complex area which has a rarity of good material explaining and guiding a reader through the law. The book has expressly been written for tax advisers and also advanced students. Any work for the professional market must be capable of rapid, logical use and easy to search through. So good indexing, sensible division of material and notably 'lie flat' binding or loose leaf pages are often seen. This book is well indexed with a good division of material. Perhaps the paragraphs are a little long and the page lay out not as easy to follow as some other tax works but Mr Harris has done much to overcome the dreadful complexity of most of the subject matter. The book does not have loose leaf pages but will at least lie flat when open to all but the extreme ends.

The area the book deals with is tax events where there is some international element. Typically there is a financial transaction across the border, or a New Zealand resident receives income overseas or else one of the parties in a transaction here is not a New Zealand resident. The author has divided the subject matter primarily into two sections: Part 3 deals with residents receiving income from overseas; then Part 4 covers non-residents receiving income from New Zealand. For the practitioner this is an obvious division for what will be the most used sections of the book. Within Parts 3 and 4 Mr Harris has generally proceeded by going through all the various types of income, in each case setting out the position at New Zealand domestic law. That is followed by how the Tax Treaties modify that position. This approach perhaps produces a longer book but it certainly makes for a more usable one.

In addition there are quite well thought out Parts on Territorial Scope of New Zealand's Income Tax, International Double Taxation and the Tax Treaties, Special Taxation Regimes for particular types of business eg transportation and mining, Particular Entities and Persons as taxpayers eg trusts and diplomats, and lastly on the Anti-Avoidance Measures (notably the International Tax/Branch Equivalent Regime which has been one of the features of our taxation law since the Douglas era).

In each of these areas Mr Harris assists the reader to come to grips with the law. As an example, when dealing early in the book with the concepts of residence and source which are at the heart of international taxation there is a solid coverage of the history of the case and statute law. This coverage runs through to the amendments in the Income Taxation Amendment Act 1988 (No 5), and the permanent place of abode test from the case law, to illustrate and explain as best can be done that the 1988 amendment needs

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some careful interpretation to be made to work in practice. This is as good a treatment of this area as has appeared since those amendments. Mr Harris runs through a variety of examples which provoke doubt as to the application of the residence rules. This reviewer suggests with respect that Mr Harris might have gone on to state openly that the 1988 amendments were an unhappy change to the law. At a time of calls for and at last action on tax simplification¹ would we be better served by a residence rule capable of easy application, as say a 'counting the days' personal presence test is, even if that means some prospective taxpayers avoid paying tax anywhere? The same comment can be made of other sections of the book, but after all this is a text for use with the law as it is, rather than a commentator's call for change.

The book is a valuable contribution to the subject and worthwhile reading for anyone requiring good information on these topics let alone practitioners dealing with clients' problems. This reviewer's only real concern is how long the book will remain current if recent rapid change continues. Tax advisers have grown used to 'throw away' limp bound books and loose leaf services to cope with rapid and voluminous statutory amendments in recent years. If such change continues Mr Harris will need to have the second edition ready soon.

PRINCIPLES OF CORPORATE INSOLVENCY LAW by RM Goode.
Sweet & Maxwell, London, 1990, xxiii + 231 pp (including index). Reviewed by
John Managh.*

This hard covered book is a timely review of the principles underlying corporate insolvency. The author is of course well known for his writing on company and commercial law matters. The book does not attempt to project future developments in case law but rather lays down the theoretical basis on which the law is based, that is, a rationale for why the law is.

The chapters of the book are as follows:

1 The Framework of Corporate Insolvency Law

This chapter deals with the history of the development of insolvency law and the sources of current law. Thus objectives in the conceptual sense are also spelt out. This is both interesting and useful when one has become too immersed in the cloud of facts in a situation. A return to basic principles in such a context can provide a sound guide to the way ahead.

1 For instance see the Interim Report of the Tax Simplification Consultative Committee 1990.

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2 *The Principles of Corporate Insolvency Law*

Ten principles are canvassed relating to insolvency law. These principles are as follows. Corporate insolvency law recognises rights accrued under the general law prior to liquidation. Only the assets of the debtor company are available for its creditors. Security interests and other real rights created prior to the insolvency proceeding are unaffected by the winding up. The liquidator takes the assets subject to all limitations and defences. The pursuit of personal rights against the company is converted into a right to prove for a dividend in the liquidation. On liquidation the company ceases to be the beneficial owner of its assets. No creditor has any interest in specie in the company's assets or realisations. Liquidation accelerates creditors' rights to payment. Unsecured creditors rank *pari passu*. Members of a company are not as such liable for its debts.

3 *The Concept of Corporate Insolvency*

This chapter reviews the various methods used in the UK for a test of solvency. Such tests have relevance not only in terms of actions for determining personal liability but also for those seeking an administration order or winding up. The cash flow test and balance sheet test are reviewed.

4 *Winding up: Assets Available for Distribution*

This chapter deals with what assets may be brought into the winding up for the ultimate benefit of creditors.

5 *Winding up: The Distribution of Assets and the Ranking of Claims*

The chapter heading is explicit. It provides a useful overview of why payments are made in a certain order in a winding up. Occasionally one could wish to have creditors read this chapter and gain an understanding as to why someone else is being paid out ahead of them.

6 *Administrative Receivership*

This chapter deals with the "administrative receivership" which is a term found in the UK Insolvency Act 1985. The term replaces the well known phrase "receiver and manager". However the term only embraces a "receiver" appointed under a debenture. Such a charge must include at least a floating charge.

7 *Administration*

This is a concept not yet provided for within our law. The presentation of a petition for an administration order freezes enforcement of the rights of secured and unsecured creditors, except with the leave of the court. Such a mechanism could prove useful in the New Zealand setting.

8 *The Avoidance of Transactions on Winding Up or Administration*

A useful chapter which reviews the types of transactions a liquidator may wish to challenge.

9 *Improper Trading and the Duties and Liabilities of Directors*

Improper trading is not yet a legal concept which is found within our Companies Act. However the section dealing with the duties and liabilities of directors spells out with clarity the legal rationale for the law.

This book is refreshing in that it deals with matters in the context of concepts of why the law of corporate insolvency is as it is. My view is that it is always better to understand why you do things rather than "you do this, this and this". I would recommend the book to both lawyers and accountants involved in insolvency work or advice. No doubt the work will find a place in the students' library as well.

A GUIDE TO TRUSTEE INVESTMENT UNDER A PRUDENT PERSON APPROACH by Russell L Davis. Butterworths, Wellington, 1990, xiv + 57 pp (including appendices and index). Price: \$NZ45.00. Reviewed by CEF Rickett.*

With the enactment of the Trustee Amendment Act 1988, New Zealand abandoned the "legal list" approach to authorised trustee investments, in favour of a prudent person approach, thus joining an increasing number of common law jurisdictions which are now using this latter approach. The Act was the result of the Report of the Joint Working Party on "Trustee Investment - The Prudent Man Approach?"¹ in 1986, which examined numerous disadvantages of the "legal list" approach, and advocated the framing of "a general law of trustee investments which will lead to the best return for beneficiaries ...".² The prudent person approach, which had its genesis in the famous decision in 1830 of the Supreme Judicial Court of Massachusetts, delivered by Putnam J, in *Harvard College v Amory*,³ now applies in New Zealand in that trustees may invest any trust funds in any property, subject to a duty to act prudently:⁴

... a trustee exercising any power of investment shall exercise the care, diligence, and skill that a prudent person of business would exercise in managing the affairs of others.

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¹ Department of Justice, Wellington, June 1986.

² Above n1, at para 11.

³ 26 Mass (9 Pick) 446 (1830).

⁴ Trustee Act 1956, s 13B. Section 13E specifies a range of matters which trustees may take into account in performing their investment duty.

There are certain variations. Professional trustees, for instance, are expected to exercise a higher standard of skill, and the Act operates subject to any provisions of the relevant trust instrument.

Such a change in the law might reasonably be predicted to have resulted in considerable uncertainty amongst trustees. As yet there have been no judicial decisions in New Zealand concerned with the application of the relevant legislation, which may well be a sign that things in the "real" world are progressing pretty well. Certainly, the range of seminars and courses advertised for trustees and others, dealing with the change, is an indication that many trustees have been and are being quite adequately trained to take on their new responsibilities. Nonetheless, the time is opportune for the appearance of this short book concentrating on the practical implications of the change in trustee investment law. Thankfully the author is not a lawyer, but rather a person intimately involved with the investment and management of trust funds. He is the ideal author for a book which sets out to discuss the range of very basic legal and practical issues facing, in particular, trustees of private estates and trusts.

The book has five chapters, of which the first two form its bulk. Chapter 1 discusses legal considerations. The major defect is that although the new provisions are constantly referred to, as one would expect, the provisions are nowhere reproduced verbatim. This factor limits the usefulness of the book to those trustees who may purchase it - because of its title - but who lack ready access to the legislation itself. In a book for which one is paying almost 70 cents a page such an omission is most unfortunate. Chapter 2 discusses investment management. This discussion would be most helpful to "lay" trustees. Chapter 3 refers to the impact of the Securities Amendment Act 1988 provisions on insider trading and disclosure, and Chapter 4 usefully reproduces the "Draft Statement of Principles" for executors and trustees produced by the American Bar Association in 1988. Chapter 5 is a collection of various precedents, discussed in earlier parts of the book, for dealing with specific needs and problems. The style is easy to read, and the production quality is good.

The book is a useful introduction for trustees, and for others interested in trustee law and practice. Researchers and others working in the area might care also to consult an excellent research paper written by an LLB(Hons) student in 1989 at Victoria University.⁵

⁵ Jason Sandford "The Prudent Person Approach to Trustee Investments - The Trustee Investment Act 1988" (Research paper in LLB(Hons), Victoria University of Wellington, Wellington, 1989), deposited in the Law Library of Victoria University. The paper also contains references to further reading.

CONTRACTS OF EMPLOYMENT by Neil Fagan Sweet and Maxwell, London, 1990, xxi +215 pp (including index). Price £30. Reviewed by Isaacus K Adzoxornu.*

To describe this book as a law textbook *simpliciter* is grossly to misinform the reader about the overriding objective of its author. Unlike a law book, Neil Fagan's work is not overkilled by a copious reliance on case law. Cases are discussed but only in so far as they fulfil the purpose of shedding light on the ever-changing contours of the contract of employment - the fundamental institution to which the industrial lawyer is forced to return again and again. Also, unlike a law textbook, the work under review is not written in a language which is beyond the comprehension of the ordinary person. Fagan, a practitioner in the field with an enviable record, could not have done better. His book is a book about law with a simple overriding purpose, which, to quote from the introduction, is to provide "a straight forward and practical guide" to "a large number of people who are involved in the day to day creation and termination of contracts of employment" (at p 1). To this end, the book was written with the ordinary participant in the employer-employee relationship, but more particularly, the employer, in mind. The employer is advised on several matters, including how to advertise positions, how to select applicants so as to avoid statutory discrimination in particular, and how to draw up contracts of employment in order to cater for the needs of a variety of employees. Contracts of company directors receive in particular special treatment. Included in the appendices too are a list of the requirements under the Employment Protection (Consolidation) Act 1978, a specimen job application form, a checklist for a contract of employment and guidelines for the implementation of maternity policy by employers to mention only a few. Law books hardly go this far.

The book consists of twelve chapters, plus the usual tables of cases, statutes and statutory instruments, an index and nine appendices. The materials deployed are United Kingdom legislation and case law and EEC legislation. Aside from the major interest of providing a practical guide to practitioners, the author pursues a secondary interest of demonstrating how the ancient and simple common law master and servant institution has been transformed within a relatively short period of time in particular by legislation, into an esoteric phenomenon whose dynamics and internal logic are threatening to defy the grasp even of those who rely on it for their socio-economic reproduction. The bulk of the book is devoted to the impact of modern protective labour legislation such as the Equal Pay Act 1970, the Wages Act 1986, the Employment Protection (Consolidation) Act 1978, and the Sex Discrimination Act 1986, to mention only a few, on the contract of employment. Chapter eleven of the book is devoted to the applicability of EEC legislation (especially Article 119 of the Treaty of Rome) in the United Kingdom. The author's conclusion from the available case law is that "the law affecting contracts of employment in the United Kingdom in particular in relation to equal pay, will be very much substantially influenced by European developments" (at p 162). Chapter twelve of the book is concerned with the implications of United Kingdom immigration laws for the engagement and continuous employment of foreigners. This chapter will serve

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as a useful reference source for foreigners including EEC and Commonwealth citizens who intend to seek employment in the United Kingdom.

The common law continues to play an important, albeit a subordinate role in the metamorphosis of the contract of employment. One area in which this source of law reigns supreme is where the courts will imply terms into contracts of employment. This function is not limited to the traditional courts, but has also been embraced wholeheartedly by industrial tribunals exercising statutory jurisdiction. Chapter three of the book is specifically devoted to an examination of the tests which courts rely on to imply terms into contracts of employment. The consequences of implied terms for specific aspects of the contract of employment, such as its creation (chapter one), variation (chapter four) and termination (chapter six), are discussed generously. If there is anything certain about implied terms, it is that one cannot be sure which test the courts will apply to include or exclude a term from the contract of employment. Fagan's advice to employers is to reduce as many terms of the contract as may be possible to writing. A term cannot be implied into the contract of employment if it is inconsistent with the express terms of the contract.

The attributes of Fagan's book are many and all cannot be listed here. Although some may criticise the book as a little below scholarly standards (given the relatively small number of cases discussed and the book's practical perspective), a book of this type is long overdue. As already observed, the book is written in clear and simple language. This will make it accessible to a larger number of readers than is the case with most law books. Its value to the employer in particular cannot be overstated. Teachers and students of United Kingdom industrial law will also find the book an indispensable addition to the available literature. It will provide the much needed escape from the sometimes overbearing and abstract approach to legal education. The price is also right given the gap which the book will fill in the available literature.

Practitioners, teachers and students elsewhere will also find the book an important source of reference. The common law continues to be applicable in most common law and Commonwealth countries. To this extent therefore, the book's readership is likely to extend beyond the United Kingdom. For those whose major interest is comparative industrial law, the book provides a reasonable summary of the law and practice in the United Kingdom and as such it should be consulted.

The last but not the least category of readers to which the book will be of invaluable assistance is the law reformer in jurisdictions such as New Zealand. The personal grievance jurisdiction of industrial tribunals in New Zealand in particular needs reform. Here United Kingdom law and practice can provide a useful starting point. One problem in New Zealand protective labour legislation is that too much is left in the hands of industrial tribunals without adequate legislative guidance. A concept such as "unjustifiable dismissal" is not legislatively defined. Lack of definition of this basic concept has led industrial tribunals to approach their task on a case by case basis. This approach is laudable; however it has made the law and practice uncertain and difficult for practitioners in advising clients. "Unjustifiable dismissal" in New Zealand has been interpreted by industrial tribunals to mean dismissal for cause, constructive dismissal and dismissal for redundancy. The procedural requirement of fair and reasonable

treatment is said to accompany any of these forms of unjustifiable dismissal. A recent Court of Appeal decision in *GN Hale and Son Ltd v Wellington, Taranaki and Nelson Caretakers etc, IUW* (11 Sept 1990, CA 158/90) has shown that even if the concept of unjustifiable dismissal can be extended to dismissals for redundancy, this can only be done by stretching the point. Fagan's book provides a reasonable understanding of how legislation can be drafted to reduce, if not completely remove, uncertainty in the law. The book also documents a wider range of protections which the law can extend to the modern worker; some of these protections are lacking in New Zealand.

Most importantly, Fagan's book is welcome proof that books about law can be written in plain English and from a practical point of view.