Book Reviews

Explaining Constructive Trusts by Gbolahan Elias. Clarendon Press, Oxford, 1990. xxvi, 168 and 9 pp (Bibliography and Index). NZ Price $122.95.

Reviewed by CEF Rickett*

For those whose intellectual or practical interests commit them to inhabiting the somewhat mystifying arena of the resurgence of equity, and the equally daunting area of the developing law of restitution, a book of this title tantalises with its offer of enlightenment. Although written with the English situation as its focus, its appeal to a New Zealand equity or restitution lawyer is undiminished. So much has happened in the New Zealand case law on constructive trusts in the last few years that a textbook account written as recently as 1985[1] is now clearly quite inadequate as a comprehensive statement, and that through no negligence or fault of its author! Indeed, a new era seems to be upon us,[2] but just what this new era promises is not clear. It has arrived like a lightening bolt, and its prospect for causing damage is just as strong. Indeed, its arrival has been so recent and so unexpected that even Dr Elias has apparently not picked it out, for at p 151 he characterises New Zealand (and also, for that matter, Australia) as being committed to the same "thesis" about constructive trusts as dominates in England. Thomas J's statements in *Powell* v *Thompson*[3] may represent the most extreme of the new era, but even allowing for a good degree of hyperbole it is safe to say that New Zealand has moved significantly away from English law and more towards the Canadian position, although with some important and subtle differences. Of course, to be fair, *Powell* itself was decided after Dr Elias had written his book, but the development was clear some time before that decision, even though Dr Elias did not see it.

All this means that in New Zealand there needs to be some serious theoretical reflection about the nature of the constructive trust. Dr Elias' book must be read by all who are or wish to be involved in that reflective process. Unfortunately, reading it will not be an easy task. The book is the text of Dr Elias' Oxford doctoral dissertation, with some additions, and it suffers from a structure and style which reflect that origin. The author creates his own vocabulary, which makes constant referencing back to the "definitions" a tedious necessity. The author's style is an odd mixture of the simple and the convoluted. Nevertheless, with some sheer dogged determination, I had, by about p 50, become familiar enough with the book's surface idiosyncrasies to be able to begin appreciating the message of the work. Persistence will be rewarded!

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1 Julie Maxton *Nevill's Law of Trusts, Wills and Administration in New Zealand* (8th ed, Butterworths, Wellington) 65-81.

2 See Robert Fardell and Kerry Fulton "Constructive Trusts - a New Era" [1991] NZLJ 90.

3 [1991] 1 NZLR 597.

Dr Elias' argument is relatively simple. He first suggests that the multifarious rules dealing with constructive trusts are generally rationalised in one of two ways. What he calls "the radical thesis", the leading proponent of which he identifies as Professor Donovan Waters, and Canada being the jurisdiction in which the thesis is most obviously practised, is the view that the rules of constructive trusts can best be understood as instruments of restitution. The second thesis, "the sceptical thesis", which Dr Elias identifies as predominant in leading English works, and in New Zealand and Australia, is the view that no coherent statement can be made about constructive trusts, save that they are imposed by the courts. The last chapter of the book contains a critique of these theses. Of particular interest to New Zealand readers will be the discussion of the issue of the extent to which the radical thesis as practised in Canada, and as emerging in New Zealand, is actually modelled on American law, as its proponents usually contend. Readers may wish to consult, in this respect, Professor Waters' most recent account of his views, in "The Constructive Trust in Evolution : Substantive *AND* Remedial".[4]

Dr Elias believes both theses are inadequate. He presents, therefore, what he calls "the third thesis":[5]

> The third thesis is that the rules should be regarded basically as means for the rational furtherance of three good aims. The three aims are to ensure that (1) one who has chosen to dispose of his options in favour of another person should abide by the choice; (2) one who has made a pecuniary gain through another person's loss gives up the gain to the other person; and (3) one who has caused loss to another repairs the loss. These three aims will ... be called 'the perfection aim', 'the restitution aim', and 'the reparation aim' respectively ...

He then discusses in some detail the "rules" of constructive trusts and argues that they can all be explained as furthering one or more of the three aims. Thus, he says, his third thesis is sustained.

The book is not merely "descriptive" however. One point which Dr Elias establishes again and again is that although the various rules can well be explained by one or other of the aims, were the relevant aims to be taken really seriously and to their apparently logical conclusions, there would be a need for both the removal of some limitations in the existing rules and the extension of constructive trust liability to some areas at present not covered. In Chapters 4 and 5 Dr Elias discusses in particular two reasons why English law has not allowed the three aims to operate coherently in defining the limits of the law of constructive trusts. He calls these reasons "fears". It must be said that these two chapters are highly relevant in New Zealand even if Dr Elias' "third thesis" proves ultimately to be unattractive here and loses out to Professor Waters' "radical thesis". The first fear is the fear of "informality". Dr Elias discusses both the Wills Act provisions and the provisions in the English Law of Property Act

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4 (1990-91) 10 E & TJ 334.

5 P 4.

1925 prescribing formalities for inter vivos property transactions (see, in New Zealand, the Property Law Act 1952). Dr Elias concludes that whilst good reasons exist for formalities in testamentary cases, no such reasons support inter vivos formalities. The latter should be abolished. There is sense in his argument. The second "fear" which Dr Elias identifies is the fear that the finding of a constructive trust in any particular circumstance provides a priority to the "beneficiary" over others, a priority which ought to be resisted. Dr Elias argues with some success that this view cannot be sustained, and that the coherent operation of the three aims ought not to be thwarted by such an unfounded concern. For a more recent and somewhat different view on the issue of priority, readers might wish to consult Professor Roy Goode's paper "Property and Restitution" in *Essays on the Law of Restitution.*[6]

Dr Elias' book promotes serious thought, and should no doubt be read carefully be the aficianados of this area of the law. Unfortunately, in these days when there is just so much to read, a book which cannot be read with relative ease and a sense of enjoyment is likely to lose much of the impact which, because of its content, it deserves to make. I hope that this will not be the fate of Dr Elias' book. The heavy price tag in New Zealand is a further impediment to its wider recognition here.

The Unification of Germany in 1990 - A Documentation Published as a public document by the Press and Information Office of the Federal Government Germany 1991, 183pp.

Noted by A H Angelo*

This is a useful collection in English of the historic documents which relate to and comprise the unification of Germany effective from 3 October 1990. The first document in the collection is the Treaty of 18 May 1990 between the Federal Republic of Germany and the German Democratic Republic establishing a monetary, economic and social union. The collection of thirty one documents includes a reply from the Federal President to a congratulatory letter from President M Gorbachev on 17 October 1990 but ends with the policy statement by Chancellor Kohl at the first plenary session of the all German Parliament on 4 October 1990.

Pride of place belongs to the Unification Treaty which in article 1 provides for the integration of the German Democratic Republic into the Federal Republic of Germany as five new Länder. Article 2 provides for the capital of Germany to be Berlin but leaves the question of the seat of Parliament and government undecided. The Basic Law of the Federal Republic of Germany is amended for the unified state by the Treaty and provides that the Basic Law is thus valid for the entire German people. A new article 146 provides that "this basic law ... shall cease to be in force on the day in which a constitution adopted by a free decision of the German people comes in to force."

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6 Andrew Burrows (ed) (Clarendon Press, Oxford, 1991) 215-246. See also Professor Waters' view in the article cited herein.

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After many years of teaching the nature and role of the Basic Law and the relationship of East and West Germany and the relationship of each to the EEC, it is interesting to see the long held aspirations fulfilled, and to have a record of the climactic events in this compendious and accessible form.

The Solomon Islands Law Reports 1987, Edited by Hugh Macleman published by the High Court of Solomon Islands 10 + 94pp (including indexes).

Reviewed by A H Angelo*

It is a pleasure to see this latest edition of the Solomon Island Law Reports[7]. The reports provide a useful insight into common law developments within the region and in particular provide evidence of the areas of doubt and stress for those settling into independence under an entrenched Constitution and of those coming to grips (particularly pertinent in Solomon Islands given the special provisions in the Constitution relating to the status of custom as a source of law) with the interaction of custom and received law.

In this volume thirteen cases are reported. Two of the cases are from the Solomon Islands Court of Appeal (of which Sir John White is President). Two are from Magistrate Courts and the rest are High Court decisions. Two cases report on constitutional matters and two on customary law matters; most decisions concern criminal law and procedure.

Three cases of interest at a broader level are the *Ombudsman* v *The Attorney-General*, where it was held that

> Nowhere is the Ombudsman given the power to represent the public or the Crown in a legal action .... Where the Ombudsman feels during an investigation that some public right has been or is likely to be infringed he should report the matter to the Attorney-General. Whether the Attorney-General then proceeds at the relation of the Ombudsman or in any other manner is a matter for him.

The second of these cases is *Solomon Islands Public Employees' Union* v *Solomon Islands Government* which considered among other things whether the power of a trade disputes panel to make a retrospective award could amount to compulsory deprivation of property inconsistent with section 8 of the Constitution.

The third case is *R* v *Rose* which considered whether corporal punishment was rendered unlawful by section 7 of the Constitution which provides against inhuman

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7 Some, but not all, of the cases are also now available in the South Pacific Islands Law Reports

treatment: "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment".

> Two boys, both aged 10 years old, were involved in a disturbance in assembly. There had been repeated warnings about the behaviour in assembly and it was agreed by both boys that they had heard such warnings.
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> The respondent who was the acting headmaster at the time, told them to go to the classroom and, when they failed to do so, took them by the scruff of their necks and removed them from the line. He then collected a cane and caned each boy on the buttocks over his trousers. It is not clear whether this occurred in a classroom or outside but it is agreed that it was in sight of the assembled children ... the learned magistrate found that each boy was struck four times. The victim in the charges was seen a short time later by a doctor who described a raised area about 1.5 - 2 inches wide and about 6 inches long. He regarded it as not very serious and recommended no treatment.

The court held that corporal punishment does not constitute either torture or inhuman punishment per se but that the inflicting of the caning in public rendered it degrading and thereby unreasonable so that the defences of reasonable punishment could not help the accused.

"Since the only matter that was wrong was the decision to inflict the caning in public" the respondent was discharged without conviction. Which just goes to show that those good old days really were bad old days!