Book review

EQUITY AND ADMINISTRATION. *Edited by PG Turner, University Lecturer and Fellow of St Catherine's College, University of Cambridge. Cambridge University Press, Cambridge (2016) lix and 526 pp, plus 14 pp Index. ISBN: 9781107142732. Hardback £74.99.*

Good dinner parties present both opportunities and traps. This is especially true for those who drink, like me. It was thus with all the impetuousness of youth that I lately asked some scholarly dining companions: "Where are all the new Equity books? *Tunc non eram qualis sum nunc*: I was not then as I am now. A sobering reply came the next day, by email. "The question is well asked", it said, "but it has a partial answer." So it is with some humility that I am pleased to review this book.

Equity and Administration is an edited collection of 12 papers, each accompanied by a shorter chapter of commentary from a different author. Its main conceit is simple, but also praiseworthily ambitious. *Elegantly* explained by Turner, its editor, it is that: Equity is best understood as existing to address "a range of practical problems regarding the administration of deliberately created schemes for the management of others' affairs" (p iii).

In contrast to something like the long-established "good man" theory of Equity then, this volume takes a facilitative view of the jurisdiction. Useful though it may be, the "good man" theory is merely a negative one. It explains Equity's role of "mitigating the rigours of the Common Law" by emphasising those circumstances in which the otherwise lawful exercise of legal rights and powers may not be undertaken. However, to do full justice to Lord Cowper LC's notion that "[it] is the office of Equity to support and protect the Common Law", we must take seriously his proviso that, while it "qualifies, moderates, and reforms the rigour, hardness, and edge of the law … *[Equity] does also assist the law where it is defective and weak*" (*Dudley v Dudley* (1705) Prec Ch 241, 244; 24 ER 118, 119 (emphasis added)). This is what *Equity and Administration* tries to do and it is more or less successful in that endeavour.

As the concept of "administration"—or "management of affairs" (p.16)—is a broad one, the scope of this collection is, interestingly, not limited to that part of Equity which covers the law of trusts, or, indeed, to that part of it which relates to "private transactions" (p.3). Thus, while its first few chapters *are* on trusts, the book also considers other (strictly) private law issues—such as Equity's role in the distribution of an insolvent estate—and a number of public/private, and even purely public law issues, too. Chapter 20, for instance, which is a real highlight, is on Equity and human rights. Chapter 16, written by Gummow, focuses on the significance of Equitable remedies in public law. Ultimately, the balance

between those chapters focusing on Equity's involvement in aiding the administration of private ~~as opposed to public~~ affairs—which is about equal—feels right.

The two leading contributions to the first half of the book are those of Newey (Chapter 2), and Langbein (Chapter 10), though the latter is much enriched by Matthews' wry gloss (Chapter 11). Newey's chapter, on how Equity constrains the exercise of trustees' powers, is a concise but perceptive run-through of the many and varied ways in which the courts control the use of such discretions. It subtends to the book's overarching theme by emphasising how, in acting as it does, the law's focus is on the full and proper execution of settlements (that is to say, in a way which is consistent with the provisions of the trust instrument, if any, and the general law). Indeed, for this reason, it should be as informative for the practitioner as it is for the academic. Fundamental parts of the law, so often only implicitly taken into consideration, are teased out and their role properly accounted for. Thus, the sections on "genuine consideration" (p.38), "construction and the general law" (p.39) and "procedural fairness" (p.57) are particularly enlightening.

A handful of errors do creep in. Whatever a clever tract of argument might leave us able to conclude, namely "that, in this jurisdiction at least, the fact that a decision was made without due care can justify rescission" (pp 54–55), a trustee's "culpable failure to have regard to correct considerations" (*ibid*) is just not, in and of itself, a "breach of fiduciary duty". Realistically, if that term is to have any strength, it needs to be confined to breaches of a duty of loyalty (*Bristol and West Building Society v Mothew* [1998] Ch 1, 18), and that is not what such negligence necessarily amounts to. As *Paragon Finance Plc v D B Thakerar & Co (A Firm)* [1999] 1 All ER 400, 415–416, shows us, when it is otherwise, confusion and error soon follow. Similarly, it is odd that Newey distinguishes between rules of "prophylaxis" and "the duty of loyalty" (pp 57–61). The "no-unauthorised-conflict …" and the "no-unauthorised profit" rules, which he identifies as instances of the former, are, in fact—as a matter of English law, at least—the only two facets of the latter (*Bray v Ford* [1896] AC 44). Equitable duties of "good faith"—for which the author tries to reserve his second label—can appear in a variety of manifestly non-fiduciary situations (see, for example, *Kennedy v De Trafford* [1896] 1 Ch 762; [1897] AC 180). Duties of loyalty, by definition, cannot.

The focus of Langbein's chapter is the one question whether "the rule in *Saunders v Vautier*" ought to be abolished. If that happened, English law would align itself with that of most US states, and hold that, "[if a] restriction upon [a beneficiary's] possession and control is … one that [all other things being equal] the [settlor] had a right to make; [there is] no good reason why [their] intention … should not be carried out" (*Claflin v Claflin* (1889) 149 Mass 19, 24; 20 NE 455, 456 (Mass)). In concluding that it should be, the author conducts a detailed and well-reasoned survey of the competing arguments for and against the rule. He rightly makes clear that the question is ultimately one of policy: assuming the fact of an adult beneficiary with a vested interest, once a trust has been successfully created, whose "ownership" do we think is more important, the settlor's or the beneficiary's?

Matthews' playful response is that Langbein misunderstands England's priorities. He himself supports the rule, principally—it seems—on the basis that, while a settlor's base intention to "give the entire beneficial interest immediately to the beneficiary" is

respect-worthy, any "postponement clause" they may have tried to add will be "repugnant" to that intention and therefore worthy of 'disregard' (p.205). Yet it is not clear why he views a settlor's intention as severable in this way, instead of taking it in its entirety. If, as Matthews hints, the only reason is that this is what English law currently tells us we should do, we might wonder how constructive a point this is to make when evaluating the inherent strength of positive arguments for reform. Overall then, though at times they may be talking past one another, the two chapters together are generally informative. Anyone looking to form a serious understanding of this foundational rule of law, and of the principles and policies surrounding it, would be wise to read them both.

The biggest omission from the book is that of a chapter considering Equity's approach to personal remedies for breach of trust. The Supreme Court's decision in *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58; [2015] AC 1503 was handed down after the papers which became this book's chapters were first drafted, but *Target Holdings Ltd v Redferns (a firm)* [1996] AC 421 was not, and yet it does not receive a single mention. Surely, if *Equity and Administration's* main thesis—that "many uniquely equitable principles, doctrines and remedies have the purpose of aiding and regulating the performance of practical tasks [such as trust] administration" (p.2)—was to be fully tested, it should have been done so by reference to the area of law which those two cases have come to dominate? In Chapter 4, Nolan does argue that the rules mandating both the type and the extent of proprietary relief available following a breach of trust support the notion that Equity exists to facilitate their due execution, but his contribution is essentially unsatisfying. Some of what is said, for instance, could have been a springboard to a much needed discussion of whether there really is something special about Equity which means that the tracing rules it employs are, or need to be, more rigorous than those available at Law, but the opportunity to do so was missed. Ultimately, the chapter contains little more than a worked-through restatement of orthodox doctrine.

Perhaps the most unexpected contribution to the second half of *Equity and Administration* is a sprightly chapter by Walker (Chapter 20). It contains interesting insights into the legal background to the Married Women's Property Acts (which sowed the seeds from which the modern "common intention constructive trust" would grow) and the development of the tort of misuse of private information. Those with an interest in either of those still-nascent areas of law should take note of what is said.

On the first topic, the author was right to point out that Equity made a "conspicuous contribution to the advancement of human rights" (p.380) of married women at a time long before either the Law or the legislature was interested in doing so. Yet he could have gone further still. As part of its broad jurisdiction over "fraud", eighteenth-century Equity was intervening in cases, and making orders which, all other things being equal, could have had proprietary effects, in relation to unmarried woman, too. Consider *Woodhouse v Shepley* (1742) 2 Atk 535; 26 ER 721. The claimant was the administrator of Hannah Woodhouse's estate. Hannah had previously shared a relationship with the defendant, Robert, which, though it appeared to end when her father discovered its existence, in fact continued in secret for some time. The two even executed certain bonds in each other's favour. Hannah's provided that she would pay him £1,000, unless, on or before the expiration of 13 months after the death of her father, she married him.

Unfortunately, at some point between then and 1735, when her father died, Hannah and Robert really did break up. Thirteen months passed, and she brought a bill in Equity, grounded on "fraud", seeking to be relieved against her bond. When she died her case was taken over her administrator. Lord Hardwicke LC held that it should be delivered up to be cancelled. Together, Hannah and Robert's actions were "a fraud on [her] father, who [was, as a result of them, allowed to think that] his child [had] submitted to his opinion of the match, and [who], in that opinion, [had made] a provision for her … which, had he known of the bond, he would not have done" ((1742) 2 Atk 535, 539; 26 ER 721, 724). *Morris v Mac Cullock* (1763) 2 Eden 190; 28 ER 870 did not involve an agreement concerning a woman's property, but it was a case of the same "type" of "fraud", and shows us that, had property passed between them pursuant to their arrangement, Robert would have been ordered to hand it back to Hannah.

Pleasingly, Walker's second topic—the development of Equity's established doctrine of breach of confidence in order to protect the values embodied in Art.8 of the European Convention on Human Rights—happens to be a clear example of the phenomenon noted by Heydon (in Chapter 12): that the passing of a statute can facilitate Equitable development. It is also a fine and almost entirely up-to-date commentary on the most recent instance of mitosis in the English law of civil wrongs. As the Court of Appeal have very recently confirmed, the process started by the House of Lords in *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457 has now come to an end. The equitable wrong of breach of confidence has given birth to a new, and only partially overlapping tort, and is now to be left to concern that which, previously, it had been carefully developed to cover: *Vidal-Hall v Google Inc* [2015] EWCA Civ 311; [2016] QB 1003.

The last thing say about *Equity and Administration* is that its 24 chapters are nicely book-ended by a thoughtful introduction and conclusion. Parts of both, such as the examination of "four perspectives" in Turner's preface (pp 6–16) and Conaglen's comments on "modes of regulation" (pp 508–512) at the end, might be fruitfully read by those looking to discover something of the intricacies of Equity for the first time.

Apart from those focused on the law of trusts—of which there has been a good number—there have, in recent years, been so few new books about Equity that any entry onto the field of play ought tentatively to be welcomed. *Equity and Administration* deserves more than that, however. For those who devote their time and effort to the study of the jurisdiction, its breadth and vibrancy means it should act as a useful stimulant. It is deserving of quite some praise, and is well worth a read. That is the other thing good dinner parties offer by the way: a stimulant. Right at the end of proceedings. Before email addresses are exchanged.

Julius Grower
University College London