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OCCASIONAL SERIES

Pioneering the Laws of Commerce: Conversations with Professor Leonard Sedgwick Sealy for the Cambridge ESA

Abstract: The calm and courteous mannerisms that Professor Len Sealy's interviews radiate belie a pragmatic determination that has been the hallmark of his long and productive career. For nearly six decades he has been a legal pioneer, working assiduously to elevate the law of commerce, and in particular company law and insolvency, to scholarly respectability in academia and practical understanding in boardrooms. Yet typically, for one who spent his entire professional life collaborating with wealth creators of the commercial world, he eschewed direct personal involvement in such activities. His loyalty to the scholastic tradition, mirrored in his unstinting service to his college and the Faculty, has generated a legacy of fond regard and intellectual respect. These reflections by Professor Sealy are based on interviews with Lesley Dingle at the Squire Law Library during February and April 2013. They should be read in conjunction with Professor Sealy's entry in the Eminent Scholars Archive[1].
Keywords: company law; commercial law; academic lawyers; biography

When Len studied for his law degrees (LLB and LLM) at the University of Auckland in 1948–54, company law was not considered substantial enough to warrant a separate paper, and in examinations it was combined with partnership. The situation was little different at Cambridge, and on arriving at Gonville & Caius to undertake his PhD (1955–58), he explained that "*When Bill Wedderburn*[2] *introduced the subject here, he couldn't persuade the Faculty to have* [a paper] *called company law (which was instead called the law of corporations), and he brought in trade unions and all sorts of non-corporations to give it enough width*."[3] Len had, in fact, planned to research aspects of administrative law under Professor Emlyn Wade[4], but after the exhaustive efforts of a fellow New Zealander (Robin Cooke[5]), who had just completed at Caius and gone back home to practice, Wade was not convinced that there was enough in it to sustain further scrutiny. He dissuaded Len, who turned to his second interest, company law. This was a topic with which he had some familiarity from his training for the New Zealand bar, undertaken in parallel with his LLM studies during 1954. Wade acted as Len's supervisor for one term before he fell under the guidance of Mr Wedderburn.

It was an open field, "*only just getting off the ground as an academic subject, thanks largely to the publication by Professor Gower of London of the first edition of his book 'Modern Company Law'*[6]". It was a decision he "*never*

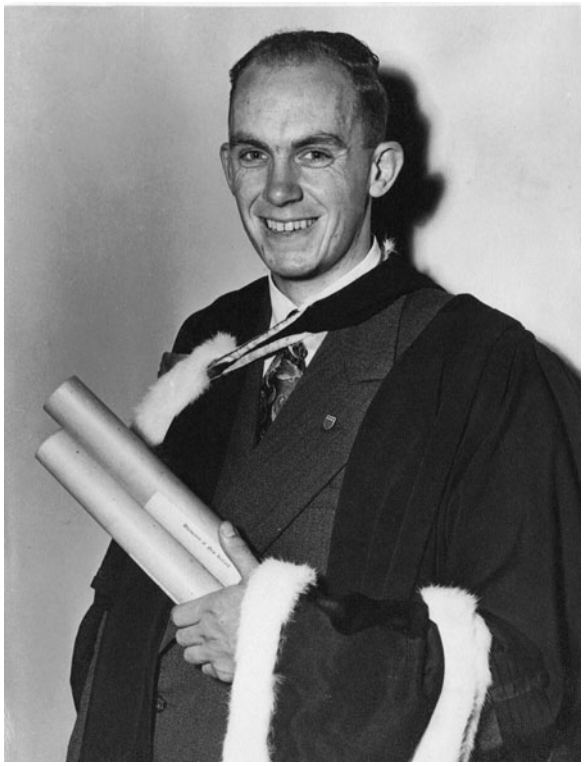

Figure 1: Len Sealy. Graduation BA LLB, University of Auckland, 1953.

regretted", leading seventeen years later to bringing out his own radical text[7] in a subject to which he has made a plethora of seminal contributions.

What lay behind this ambivalence to company law in the early 1950s, and how did Len set out on his pioneering journey? Professor Barry Rider[8], in his introduction to the *Festschrift*[9] to honour Professor Sealy's retirement in 1998, highlighted one of the dilemmas the young researcher faced as he strove to identify consistency in the legal approaches within company law. He wrote (p. xviii) "In some quarters, company law is even considered to be lacking in the sort of intellectual rigour that characterises real scholarship". I put this quote to Professor Sealy during our interviews and asked him to explain what Rider was referring to and he replied "*I think probably generally, this was the attitude of academics – "there was a Companies Act and therefore you didn't have any particular case law to look at*"".

Professor Sealy changed this. Although Gower's 1954 book had opened up new avenues of thought on the subject of company law, and he realised that for the first time there was a text that "*wasn't* [just] *a commentary on the Companies Act"* and that "*a great brain* [with] *a practical background"* had been brought to bear on the subject that opened it up *"to debate in all sorts of areas"*, Len could see a major omission. There was "*almost nothing to say on directors' duties*". He realised that this would be a key to unlocking many of the cases wherein solutions could be "*unearthed if somebody took the time to go into it*," and the conundrums which many company law cases posed. He saw these as analogues to conflict of laws when dealing with completely different jurisdictions, except in company law, one was dealing with Chancery judges and common law judges, who in those days "*never talked to each other*"[10].

When I asked Len about the early stages of his PhD research, he recounted how "it took quite a while for my research to take shape. I was left free to let my reading range wherever it seemed to lead, and I found myself immersed for quite some time in the history of the great trading corporations such as the Hudson's Bay and East India Companies. After them, there was a huge gap in the story, between the Bubble Act in 1720 and the first Companies Act in 1844. [During this] century and a quarter the industrial revolution and global colonisation expanded massively, while the commercial law associated with these developments left very little in the way of official records."

"I discovered that the business world had had recourse to the law of partnership and resourceful equity lawyers had established models for financing and running commercial enterprises without recourse to the courts (which avoided the risk of incurring the heavy penalties that might result from running foul of the Bubble Act). It was through this period that the seeds of company law as we know it were sown. It was an area where legal scholarship had hardly ventured."[11]

Professor Sealy's line of thinking is set out in the Preface to his PhD thesis[12], and it is worth quoting it extensively (p. i) "…I found at an early stage of my research that no proper study of the fiduciary obligations of directors and promoters could be made without undertaking a fairly full inquiry into the equitable principles of fiduciary obligations generally - an area in which little work has been done. Accordingly, my aim has been, in the first place, to find out what the equitable rules and principles of fiduciary obligations are, and to trace their origin and development, both generally and in relation to the special positions of the director and the promoter."

Len Sealy's work on fiduciary obligations in relation to directors' duties was a revelation. "*The topic grew out of law of trusts and unlike a person who's been formally appointed a trustee, the director of a company, or a person who's acting as an agent to some extent – a parent or a guardian and so on – is placed under trust-like obligations because of the confidential relationship which exists between them. I discovered that this subject was developed very largely in the 19th and even partly in the 18th century by the Chancery judges who'd grown up dealing with trust cases and they met cases of sharp practice and so on in the evolution of the early company, which they applied the trust principles to*"[13].

But for contingency, this could have been the limit of Len's contribution, for on compilation of his PhD in 1958 he returned to New Zealand. "[I] *had no other plan ever. It* [Cambridge] *was simply a lovely interlude in what was going to be a career at the bar or behind a desk in law in New Zealand and that's what I went back to"*. But, after less than a year doing advocacy work in Hamilton, with, ironically, no company law, Len's thesis won him the Yorke Prize, and in 1959 he was tempted back to Cambridge and a Research Fellowship at Gonville & Caius, where he has remained ever since.

He published several papers on the topic of his thesis in the 1960s[14], and then set the matter aside while he plunged into the hectic round of lecturing and supervisions that his Assistant and then full Lectureship demanded. "*I'd done my little bit on that and was moving further into the more commercial side of things, rather than historical and 19th century equity*"[15]. This left the field open to a fellow antipodean from Sydney University, Paul Finn[16], who arrived at Caius in 1971, drawn by Len's earlier work. When I interviewed Justice Finn for ESA in 2010[17] he spoke of the "*real intellectual debt* [he owed] *to Len Sealy. If he had continued to do the work that was foreshadowed in his doctoral thesis, I wouldn't have written the book I wrote*". Len disputes the fact that he could have written a definitive text on fiduciary obligations, and generously conceded that Finn "*went into the subject in a huge way, massive research, and wrote the definitive book*[18], *which is always missing from library shelves …..he put the subject on the map. It was then taken up quite enthusiastically by the Australian judges,* [and] *the Australian High Court developed the subject in a number of key cases….then it took off round the world and now it's almost a subject of study in its own right.*"[19] Len's unearthing had taken off.

Teaching, supervisions and the duties of being a Tutor at Gonville & Caius were time consuming and allowed

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little prospect of doing research. As a consequence, during a year's sabbatical at the Australian National University in 1968, Len jumped at the opportunity it offered to extend his pioneering considerations of company law. At ANU he was sponsored by Professor Sam Stoljar, a refugee from pre-War Germany who had interests in agency and contract law[20], and mentored by the "*very jolly and slightly cheeky*" Professor Geoffrey Sawer[21], Head of the Institute and the leading expert on the Australian constitution. His surroundings were very congenial, "*the building …..was built like a honeycomb so that everyone had access to the light on both sides, but where any three branches joined there would be a cafeteria. So if I went to have a coffee in a westerly direction I might have political scientists to share my coffee with. If I went in an easterly direction, it might be an economist and another direction…* [there] *was a great exchange of chat …not necessarily very serious, but it was very enlightening*.." and with the luxury of no teaching responsibilities, Len started work on his seminal *Cases and Materials in Company Law*[22]. [During this fruitful period at ANU, Len also began his long association with the relaunching of the 19th century classic *Benjamin on Sale*[23]].

For the next three years Len worked on this book, and although the first, 1971 CUP edition ran foul of the Press's decision to quit legal publishing soon after it appeared, the project was enthusiastically taken up by Butterworths, and it became a great success (now in its 9th edition, edited by Professor Sarah Worthington). In his resumé of Len's career, Professor Rider cites this work as one of Professor Sealy's "most significant published contributions to the teaching of law", citing the work's novelty and Len's putting the law into context. In particular, Rider highlights Len's "willingness to admit there are areas of uncertainty and even confusion in the law"[24].

These were the conundrums to which I referred earlier, and when I asked Len to comment on Rider's praise of his pragmatic notion of "opportunity as a property, actual or potential" (Rider 1998, p. xix), he explained *"the cases I'm referring to were each cases where a company was on the point of developing business, or a contract, or a director learnt that somebody had an idea which the company might take up, and instead of letting the company do it, he sneaked off and developed it himself*[25]*. Now, if he'd stolen property of the company, under the law of trusts, they could follow the trust property into his hands and get it back, under laws going back several hundred years, but an idea isn't property – certainly in those days before the development of intellectual property. Unless you'd got a patent on it or trademark or something, it didn't count as property.*

If they had been more willing to regard intangibles as something being capable of ownership, the existing law would have been sufficient to cope. But the existing law didn't cope, and so in one case where they had common law authorities cited to them and they'd say, "There's nothing we can do," and in another case where they had trust property cited and they'd say, "Oh, yes, we'll deem it to be a trust." So you get conflicting answers…. the potential was there for the law to develop, but they just hadn't seized it."

A similar case of foresightedness in expanding the intellectual credentials of commercial law can be seen in Len Sealy's willingness always to look to jurisdictions outside England for sources of authority. He recalled that when he was commissioned to write the section on contract in *Benjamin on Sale* in its First Edition, his reputation as a well-versed overseas academic prompted the publishers to request him "*not to put too many Commonwealth authorities in the footnotes because barristers would get rubbished by the judges if they quoted them*….[as] *the courts were very reluctant to look at any jurisdiction outside England for sources of authority.*" This aspect of Len Sealy's scholarship drew a further comment from Rider (1998 p. xviii) on his career "Len has never espoused or supported the parochial attitudes of some of his less inspired colleagues".

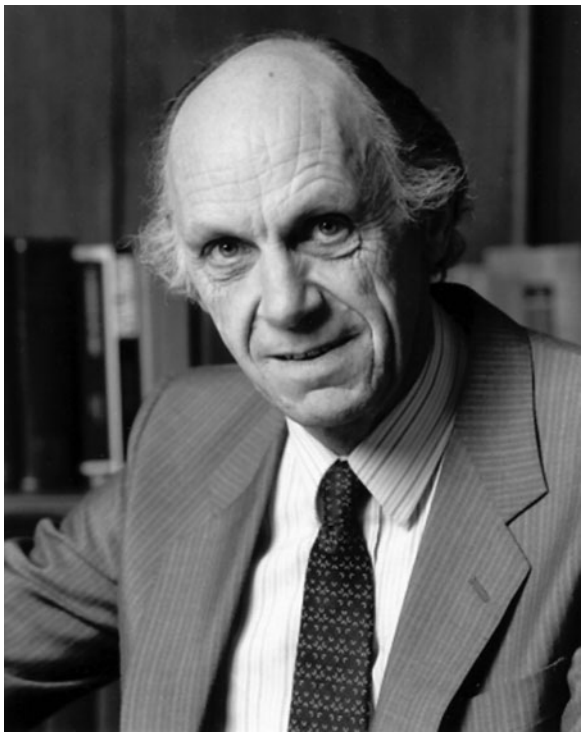

Figure 2: Professor Sealy when elected to the SJ Berwin Chair of Corporate Law in 1991.

As Professor Sealy wryly remarked "*these days, they're always citing the Australian High Court, and American courts even, with considerable willingness*.." and "*in the time that I've been teaching, it's* [the courts' attitude] *got stood on its head completely. I was actually put in as an editor to Gore-Browne on Companies*[26] *to add references to companies legislation* [and] *companies judgments throughout the Commonwealth….and update it four times a year. So the world has come really quite a long way…*"

Crucially, Professor Sealy's willingness to espouse international trends is tempered by his pragmatic

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approach to the nature and practicalities of providing clarity in a globally-operated activity. Here, he parts company with some other authorities and with the sentiments of much of current EU legislation, to show that despite his clarity of vision in teasing out intellectual strands in what is a very practical subject, it is important not to lose sight of the overall objectives of commercial activity. He explained his position thus.

"[The] *law that developed in the 19th century for the mercantile community*…[was] *all about the buying and selling and exporting of goods in bulk by the shipload and by the wagon-load and so on – nothing about buying a dozen eggs from the supermarket…. a person who bought a shipload of grain and* [when] *it arrives thinks it's not up to scratch, will either sell it or disown it on the spot.* [However], *if he were in Holland, he'd have to go to a judge and say, "What do I do?" Now, these goods…may be on a falling market..*"[27].

In addition "*If you have a shipload of something on the high seas, somebody has to carry the risk. That means somebody has to insure… If you don't know whether the goods have arrived* [or not, or] *whether the goods have perished or not, within the terms of the contract, both parties will have had to take out insurance in case they lose. It's silly if they both insure…* [I]*f you've got a hard and fast rule that says at the point when the goods are shipped the risk passes from seller to buyer, the seller knows he doesn't have to carry any responsibility* [as it now rests] *with the buyer. It's not surprising* [therefore] *that the City of London is still the capital for much of the world's bulk commerce,* [where they] *still stick to the traditional English law..*[giving] *the parties to a contract the right to make their own decisions..*"

This situation is "*in quite distinct contrast with all the civil law countries, and even to a certain extent with the United States, which has brought in a lot more judicial involvement in mercantile transactions.*"[28]. It is a legal regime at odds with sentiments expressed by, for example, Justice Paul Finn during his ESA interview, who regretted the upholding of what he called a harsh, rigid form of English contract law in rulings by the Australian High Court and New Zealand Supreme court. He was more inclined to interpretations of contract law which favoured notions of good-faith and fair-dealings[29].

Pragmatically, Professor Sealy's opinion on this issue was "*I probably do take the other view, that it's a good thing in the areas of international trade and so on that we do have cut and dried rules and we don't have to go to the judge and say, "What do I do?" or, "He didn't treat me fairly"…So I'm all in favour of judges not having discretion in big mercantile transactions.*"

But the world of commerce is not static, it is constantly evolving, and so has Len Sealy's relationships with it. I commented that in the 2006 seventh edition of *Benjamin on Sale* he had remarked that EU directives have made major inroads into domestic law, to the extent that consumer sales law has become a distinct branch of law. He explained this trend "*partly as a result of developments in our own commerce, but also as a result of the Common Market taking consumer protection under its wing in a big way, we now have almost a distinct body of law dealing with the remedies and rights of consumers who buy consumer goods and services….if you buy a hot water bottle which bursts, there's a completely different code of law for you and a lot of protection, both stemming from Brussels and from our own consumer protection legislation.*"[30]. This is mainly "*under the direction of European Community directives, so that we have more or less uniform laws right across the community…judges have a limited role I think now, and the whole object of consumer legislation in many cases is to take it out of the courts and say that the customer is always right…Litigation is too expensive for the consumers to have recourse to it, so it has become largely statute-based.*"[31] Len realises that "*that's the way in which the law needs to develop for consumers,* [because] *that sort of case doesn't go to the High Court in Australia or to the Supreme Court in England, does it?*"[32]

One of Professor Sealy's strengths was highlighted by Rider in Len's festschrift[33]: his ability to "present highly complex concepts or incomprehensibly drafted statutory provisions in a way which engenders understanding.." This has clearly been a tremendous boon to the subject where legislators have singularly failed statutorily to advance some areas of English commercial law beyond its Victorian foundations. The main cause is "*not a lack of imagination, but just the will to make change*[s]…*even in the latest 2006 Act*"[34]. Len explained that although "*we had a Law Review Commission or Committee set up… for six or eight years…and which came up with a large number of books of recommendations…many of these mainstays of the old law…have been replaced by hugely complicated and hugely elaborately worded statutes…I counted the number of sections in the first Companies Acts and …discovered something like 780 sections. Now, we've simplified the working of the law from then until now to an extraordinary degree by getting rid of these restrictive old doctrines, but there are now 1,300 sections in the Companies Act and 16 schedules. That's massive. There's a verbosity and overelaboration of sanctions…which they've managed to do without in the United States.* [There] *the Corporations Act is the foundation of legislation in almost all the 50 states…it's under 50 pages, I think. Canada enacted its corporations law…and it gets the whole of the law into under 100 pages. They are more advanced in many ways. We ……haven't done it in a way which is efficient in its use of words,* [and] *doesn't trust business to get on with things,* [or] *trust the judges to make sense of the legislation* [It] *spells out what a judge must say and so on, in a hugely. extraordinarily verbose way.*", while a compounding factor has been the "*brakes being put on things from Europe….they won't let us* [go further] *because German law and French law have always been rather more restrictive than ours*".[35]

An example of such inertia was identified by Professor Sealy when talking about "*security over personal property, in other words hire purchase, leasing and other arrangements where people are in possession of things in a commercial context which they don't own… We've never*

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been able to cope with that under the statute we've got. We fudge things all the time. Now, America's had an Article 9 of its commercial code, for probably 70 or 80 years..[which has] *worked smoothly and perfectly. We've had recommendation after recommendation by consultants and committees and by the Law Commission…so that we don't* [have to] *stick to elaborate artificialities like hire purchase which were proved to be judge-proof in the 1890s. We've done it that way ever since without saying there's a more straightforward way to do it. New Zealand, Australia, Canada, almost every other mercantile country in the Commonwealth has gone the American way in hugely simplifying the law. We haven't bothered to do it."*[36]

Professor Sealy summed up his frustrations with this state of the UK law epitomised by the Companies Act 2006, in his typically sanguine manner "*It's far too verbose and far too full of unnecessary things, but I've been harping on about that for a very long time*." Len's ability to cut to the essence of such verbosity obviously accounts for the popularity of his books, while he identified two ramifications of this wealth of statute (notwithstanding its shortcomings). The first is that judges have had their ability to make pioneering decisions in company law curtailed, and now make enabling or constructive decisions, while the second is in teaching. Here "*students* [now] *have rather less recourse to cases*, [instead] *they need to know their way around the statutes."*[37] This is reflected in the structure of the early and later editions of his *Cases and Materials in Company Law*.

A consequence of his broad international vision and experience is the number of texts that he has produced, and their popularity, as reflected in the large numbers of editions to which they have run. I have mentioned his *Cases and Materials* (1971, 9th Ed. 2010), and *Benjamin's Sale of Goods* (1974, 7th Ed. 2006), but there have also been *Disqualification and Personal Liability of Directors* (1986, 5th Ed. 2000), *Annotated Guide to the Insolvency Legislation* (1987, 16th 2013), and *Commercial Law* (1994, 4th Ed. 2009), while Len remained a senior editor on both *International Corporate Procedures* and *Gore-Browne on Companies* until 2005. Such experience was in demand, and over the years Len has acted in various capacities aiding (mainly) Commonwealth countries upgrade their own company law – Malawi, Vanuatu, the Sudan, Uganda, Antigua and Barbuda. Some of his amusing anecdotes in these far flung places can be found in the interviews on his ESA entry.

Summing up his own journey through the changing landscape of commercial law, Professor Sealy said: "*I've never been a one-subject-man, but I have been in an area where subjects coalesce and conflict… I think the only subject that probably has a bigger academic challenge is conflict of laws..*"[38].

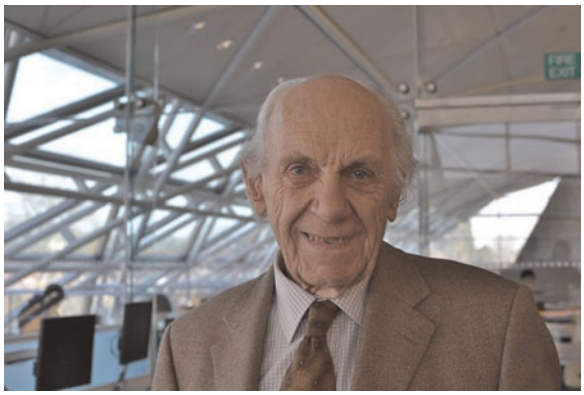

Figure 3. Professor Sealy on the third floor of the Squire Law Library, 15 February 2013.

It has taken innovation and determination to help transform this landscape to cope with the demands of modern commerce, and talking to Professor Sealy I sensed that he still stays well abreast of his subject. When this approachable, generous and quietly-spoken scholar retired in 1997, he still had seven book titles in print, and although "*gradually they have slipped away one after another"* he confesses, cryptically, that "*I keep an eye on some of them that have still got my name on*".

Footnotes

[1] http://www.squire.law.cam.ac.uk/eminent_scholars/ Quotations (*in italics*) are from the archive and relate to Question (Q) numbers in the transcripts. Quotations not in italics are from notes supplied to me by Professor Sealy during interviews for ESA. I am grateful to Professor Sealy for his comments on a draft of this paper.

[2] Kenneth William Wedderburn, (1927–2012). Baron Wedderburn of Charlton, Labour politician, Cassel Professor of Commercial Law, LSE (1964–92). He was a Fellow of Clare College and taught law 1952–64. He wrote *The Worker and the Law*, Penguin Books Ltd, 1965.

[3] Q125

[4] Emlyn Capel Stewart Wade (1895–1978), Downing Professor of the Laws of England (1945–62). A constitutional lawyer.

[5] Sir Robin Brunskill Cooke (1926–2006), Baron Cooke of Thorndon P.C., Judge of the Court of Appeal, New Zealand (1976–96).

[6] Laurence Cecil Bartlett Gower, (1913–1997) MBE, Cassel Professor of Commercial Law, LSE. 1st Ed 1954, L. C. B. Gower, *The Principles of Modern Company Law*, Stevens & Son, London 599pp. [9th Ed. 2012, Davies & Worthington, *Gower & Davies: Principles of Modern Company Law*, Sweet & Maxwell, 1180pp.]

[7] *Cases and Materials in Company Law*, CUP (1st ed 1971). (9th edn 2010) with Sarah Worthington.

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[8] (b. 1952-) Professorial Fellow, Centre for Development Studies, University of Cambridge (2004-), Director of Institute of Advanced Legal Studies, London (1995–2004).
[9] Rider, B. (Ed). *The Realm of Company Law*, Kluwer (1998).
[10] Q126
[11] Quoted from notes supplied to me by Professor Sealy during the interviews.
[12] *Fiduciary Obligations in the Management and Promotion of Companies*, PhD thesis, University of Cambridge, (1958) 374pp.
[13] Q23
[14] Fiduciary relationships (1962) *CLJ* 69–81. 1963. Some principles of fiduciary obligation (1963) *CLJ* 119–140. 1967 The Director as Trustee (1967). *CLJ* 83–103.
[15] Q122
[16] Professor Justice Paul Finn (b. 1946), Judge of the Federal Court of Australia, 1995- present, Goodhart Professor 2010–11.
[17] http://www.squire.law.cam.ac.uk/eminent_scholars/professor_justice_paul_finn.php
[18] *Fiduciary Obligations* Law Book Co (1978).
[19] Q121
[20] Samuel (Sam) J. Stoljar (?–1990). 1975, *A History of Contract at Common Law*, ANU Press, 220pp.
[21] Professor Geoffrey Sawer (1910–96), Professor of Law, Research School of Social Sciences at the Australian National University.
[22] CUP, 879pp.
[23] Up to *Benjamin's Sale of Goods*, (7th Ed 2006) A.G. Guest, C.J. Miller, D. Harris, G.H. Treitel, E.P. Ellinger, C.G.J. Morse, E. Lomnicka, L.S. Sealy, F. M.B. Reynolds. Sweet & Maxwell, 2720 pp. (There is now an 8th edition).
[24] Fn 8, p. xix
[25] E.g *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378.
[26] A loose-leaf reference source. Professor Sealy was the Commonwealth Editor 1997–2005. Jordan Publishing.
[27] Q99
[28] Q99, 101.
[29] As expounded, for example, in Finn 2007. The Unidroit Principles. *Federal Court of Australia Conference*. See Qs 34–36 of Finn interviews in ESA.
[30] Q99
[31] Q102
[32] Q101
[33] B. A. K. Rider, (Ed) *The Realm of Company Law: A Collection of Papers in Honour of Professor Leonard Sealy, SJ Berwin Professor of Corporate Law at the University of Cambridge*. Kluwer (1998), at page xix.
[34] Q106
[35] Q105
[36] Q114
[37] Q94
[38] Q125

Biography

Lesley Dingle is the Foreign and International Law Librarian and founder of the Eminent Scholars Archive at the Squire Law Library, University of Cambridge. She is a Senior Member of Wolfson College.

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