

Conversations with Emeritus Professor Leonard Sedgwick Sealy

by
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Second Interview: Published works and retirement

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In February-April 2013, Professor Sealy was interviewed twice at the Squire Law Library to record his reminiscences of nearly sixty years research and teaching in the Faculty of Law and Gonville & Caius College.

The interviews were recorded, and the audio version is available on this website with this transcript of those recordings. The questions and topics are sequentially numbered in the interviews for use in a database of citations made across the Eminent Scholars Archive to personalities mentioned therein.

Interviewer: Lesley Dingle, **her questions and topics are in bold type**

Professor Sealy's answers are in normal type.

Comments added by LD, *in italics*.

All footnotes added by LD.

92. At our first interview, on 15th February, we covered your early years in New Zealand, as well as your career in the Faculty and Gonville and Caius. In the second interview, could we focus on your published work and, at the end, touch on your involvement as a consultant to governments apropos their legislation and finally, perhaps we can say something about your retirement?

But before we come to the main issues, there's one point which perhaps I can ask - which is a hang-over from the previous interview - and it relates to when the Faculty was housed in the Old Schools where much of the administration seems to have been placed under a somewhat colourful but enigmatic figure - Miss Suckling³ and her little dog. I wonder whether you have any memories of her?

I don't have all that much in the way of memories because I was very much a junior and I wasn't at that stage on the Faculty Board or anything like that, but it was in the days when almost none of us did our own typing. If you wanted anything typed, you wrote it out in longhand and the Faculty had various public typists that you could send it to. She must have been a shorthand typist as well as a typist because I think that's what she was there to do and she was taking dictation from the Faculty Chairman, with the dog on her lap, I remember. One or two members of the Faculty were a bit frightened of this little dog. It was not very fierce, but it yapped a lot. I didn't know that she had a second speciality - she ended up as Mayor of Cambridge, and so when she wasn't doing very boring secretarial work in the Faculty, she was obviously much involved in the politics of the city.

93. Perhaps we can now come to your publications. The first book that you wrote was written after ten years as a lecturer at Gonville and Caius, and it appeared the year that you received your promotion to Senior Tutor. It has now reached its ninth edition and

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³ Millicent A. "Betty" Suckling (d. 1988). Mayor of Cambridge (1983-84).



is currently edited by Professor Sarah Worthington⁴. This is your 1971 *Cases and Materials in Company Law*⁵. I wonder, Professor Sealy, if you can tell me something about the background to the writing of this book?

There was a book called *Turner and Armitage on Criminal Law*⁶, written by two fellows, two members of the faculty, and the Cambridge University Press which published it suggested that a series should be started covering all sorts of areas. John Hall did one on family law, Geoffrey Wilson did one on constitutional law. I think Michael Prichard was planning to do one on land law, but that didn't happen. They invited me to do one on contract. The problem was that Smith and Thomas which was one of the bestselling books on contract - *Case Book on Contract Law*⁷ - was already well established, so I asked if I could switch to company law and that's what I did. So I joined that series. Now, mine is the only book still going. Shortly after the first edition was published, the CUP went off the idea of law publishing almost altogether, and so I was invited to find another publisher. Butterworths was very willing to take it over because they'd already done Smith and Thomas. I did have a good breakthrough at that point because the CUP only wanted us to publish extracts from materials with no commentary, but this made it possible for me to add my own comments, modelling, to some extent, on Smith and Thomas, and it was that that gave the book a lift, I think. The others have all gone out of print, I'm afraid.

94. You gave two reasons for writing it in the preface. You said that because company law was not codified, much of the law went back to court decisions in another age, as you put it. Pioneering decisions of company law were judge-made, like *ultra vires* doctrine, maintenance of capital rules, so in the first edition, cases were very important for students to look at. By the 2010 edition, ninth edition, there was a New Companies Act 2006, with statutes on corporate capacity, directors' duties and so on, plus other legislation. Also there's been massive EU intervention. With all this legislation, is there now any leeway left for judges to make these pioneering decisions, do you think, Professor Sealy?

I think pioneering is no longer on. What they used to do is... it's quite different now because it's statutory interpretation. They are making enabling decisions and they're making constructive decisions on the whole, especially with the insolvency legislations I'm concerned with. That Act was not especially well drafted and there've been lots of problems that have had to be overcome and almost every time it's gone to a judge, he's made it not the restrictive or reactionary prescriptive decision, but opened the case and said "why not?" And so they're not making pioneering decisions in the sense of earth shaking changes, but they are enabling the law to work. Of course, it changes teaching as well, because students have rather less recourse to cases and they need to know their way around statutes. The Companies Act is now 1,300 sections and 16 schedules, and that's a massive amount to master. It's far too verbose and far too full of unnecessary various things, but I've been harping on about that for a very long time. So not pioneering decisions, but very constructive decisions, yes.

95. So case law is still important?

Sure. Yes.

⁴ Downing Professor of the Laws of England

⁵ Cambridge University Press, 1971, 879pp. Now published by OUP.

⁶ CUP, 1953.

⁷ First Ed. 1961. 12th Edition 2009 : Roger Brownsword (Ed.), *Smith & Thomas: A Casebook on Contract*, Sweet & Maxwell.



96. In 1971, you also felt it important to give students sight of company documents, and you thanked companies for letting you use these in your large appendix. Apropos this, Barry Rider⁸, in your Festschrift⁹, said that it was very novel for you to put company law in context, and I wonder what originally gave you this idea?

Well, I did hand some of these documents out in my lectures so I suppose the idea was there. Also, I think in commercial law there were documents like bills of lading and letters of credit and so on already in books like *Anson on Contract*¹⁰, and so when we came to do the commercial law book, once again we went to real life companies and exporters and so on and said may we have examples, which they without exception always said yes, so we've got real documents with real signatures on them for real companies doing real business, and I think it helps the students to realise that the law is not something you get out of a book, but it's something to do with life and the big world.

97. I notice that in the ninth edition, this appendix is absent. Is it impractical to include it these days?

No, it's quite a different reason. The statute has taken over in these areas. For instance, the *ultra vires* doctrine led to the drafting of companies' memorandum of association with a huge proliferation of possible objects that the company might want to take up at some time in the future. You had really to show this to students to see the absurd length to which that doctrine had led practitioners to go to. *Ultra vires* doctrine has been abolished – in fact, the memorandum of association has been abolished, and articles of association are now optional, so there is nothing comparable for the students to need to know about.

Once that particular aspect of the documents had gone, there wasn't much left in company law that they needed to see on a regular basis. We also did include company accounts and so on, but students have a great distaste – law students have a great distaste - for figures, and I don't think many of them were ever encouraged to look at them very much.

98. That brings us to your contribution to the 1974 *Benjamin's Sale of Goods* edited by Guest *et al.* The seventh edition was produced in 2006. You were one of nine editors and the book harked back to 1868 to the first edition by Judah Philip Benjamin¹¹. There were eight editions up to 1950 and then the new format was launched. You were then one of seven editors in this first edition for 1974¹². Can you tell me something about the background of your involvement in this book, Professor Sealy?

Benjamin was quite a remarkable figure. He was a barrister in the Southern United States and wrote a book there. Then he became a US Senator - the first Jewish senator in the United States. Then the Civil War came and, of course, he was on the wrong side and he'd lost... he resigned from the Senate and he lost virtually everything, but he was very highly placed in the Confederate Administration. He was Attorney General and Secretary of State for War, I think. So there was a price on his head when the war ended and he managed to make his escape, first to The Bahamas, then onto an English ship - one ship caught fire, another one sank, and he arrived in England virtually with what he stood up in. He had

⁸ (1952-) Professorial Fellow, Centre for Development Studies, University of Cambridge, Director of Institute of Advanced Legal Studies (1995-2004)

⁹ “*The Realm of Company Law: A Collection of Papers in Honour of Professor Leonard Sealy*”, Barry A. K. Rider (Ed) (1998), Kluwer Law, 273pp.

¹⁰ *Anson's Law of Contract*, J. Beatson, A. B. Burrows, J. Cartwright., OUP, 848pp. 29th Ed, 2010.

¹¹ Judah Philip Benjamin, (1811-1884), British-born US politician, later QC.

¹² 1974. *Benjamin's Sale of Goods* (with Professor A.G. Guest and others), Sweet & Maxwell. 8th Ed. 2010.



British citizenship and so he was able to come to the English Bar and start all over again, but work didn't turn up in great quantities, so he sat down to write this book, and that launched his career and he became one of the most successful QCs in England in the latter part of the 19th century. The law of sale of goods at that time was all case law and then we did enact, the very first Sale of Goods Act in 1893, but successive editions of the book which were carried on by others after his death paid homage very greatly to the case law and rather neglected the fact the matter was now governed by statute, and gradually in the lead up to World War II it became obsolete.

The publishers, in fact, thought I would write an updated edition of it, but it needed such a thorough overhaul that I said to them I think you need to bring a team in to do this, so they approached people who had just finished doing an edition of *Chitty on Contracts*¹³ and we made a team of seven and wrote a new book. We did manage to keep the title Benjamin, and it's still there. It's one of these classics which really deserved not to die, and it's been very successful, particularly the international sales aspects of it which were done by Professor Guenter Treitel¹⁴. I think that's become the definitive statement of that area of the law for all users.

I did enjoy working with such a talented team.

99. In fact, you comment in the 2006 edition that EU directives have, in the meantime, made major inroads into the traditional domestic law, so that consumer sales can now be regarded as a distinct branch of the law.

Completely. The case law that developed in the 19th century was developed for the mercantile community. It's all about the buying and selling and exporting of goods in bulk by the shipload and by the wagonload and so on – nothing about buying a dozen eggs from the supermarket. 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. That's all gone into Benjamin, but that's rather about one-fifth of it, where the law has taken a different steer from tradition. Now, the rest of the book sticks to the English approach which is giving judges very little discretion and giving the parties to a contract the right to make their own decisions, 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.

But if we have a person who bought a shipload of grain and it arrives and he thinks it's not up to scratch, it's assumed he will either sell it or disown it on the spot, whereas if he was in Holland, he'd have to go to a judge and say, "What do I do?" Now, these goods may not be perishable, but they may be on a falling market when the price is dropping all the time. And it's not surprising, I think, that the City of London is still the capital for much of the world's bulk commerce, whether it's oil or bananas, so the insurance of shipping, freight of goods, buying and selling and all the trading associations like the Metal Exchange and the Corn Exchange and so on based in London, their members still stick to the traditional English law, which is the parts of Benjamin on Sale which is nothing to do with consumers. Meantime, of course, 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.

¹³ E.g. 2008, 30th Ed, Vols 1 & 2, Sweet & Maxwell. H. Beale *et al.*

¹⁴ Sir Guenter Treitel, (1928-) DCL, FBA, QC, Vinerian Professor of English Law (1979-96). Came to England on the Kindertransport.



100. In the 1974 edition, you mention that when originally passed, the 1893 Act had been used as a template for common law, Commonwealth and even United States legislation. So presumably this global harmonising with UK law no longer exists?

No, rather the contrary – almost all the Commonwealth countries still have a Sale of Goods Act which is visibly similar to ours, it uses the same language and so on.

In the United States they introduced a uniform sales act, I don't have the date now, which has moved to some extent in different directions. This uses different terminology- it deals with things on a case by case basis rather than bracketing altogether under a single concept. We deal, for instance, with the property in the goods, and we hang a lot of consequences on that concept, just like you might say in football somebody's offside, and there's lots of things which all are part of offside, but they all have the same consequences. Now, instead of having property regulating everything that happens, in the U.S. there'll be a different rule for risk and a different rule for ownership and a different rule for possession and so on, which we deal with under those concepts.

They really go straight to their solution without introducing a middle concept, so they've gone their own way, but they did initially copy our Sale of Goods Act, yes.

101. When I interviewed Justice Finn for the archive, he spoke about notions of unconscionability and good faith and how he had experienced a jaundiced response from Australian academics to ideas of good faith in commercial contracts. He said that the Australian High Court, House of Lords and the New Zealand Supreme Court have upheld what he called the old orthodoxy and he criticised the unpreparedness to contemplate duties of fair dealing. He also said that the court is sticking to a very harsh, rigid form of English contract law. Do you agree with him, Professor Sealy?

I probably do take the 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." You can look at it from other points of view. 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 in this country, 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. Now, it's silly if they both insure because that's spending two lots of money and if either of them thinks it must be the other one's responsibility, nobody insures. At least if 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, it's gone to the buyer. So I'm all in favour of judges not having discretion in big mercantile transactions. Quite different when you've got something involving the consumer, and that's the way in which the law needs to develop for consumers, but that sort of case doesn't go to the High Court in Australia or to the Supreme Court in England, does it?

102. No. You mention the consumer law, and the EU has had a large role to play here, and I wonder whether you think that there's still room for Parliament to enact further statutes of its own, seeing as the EU has assumed such a large role in this area?

We certainly have enacted our own statutes, but that's under the direction of European Community directives, so that we have more or less uniform laws right across the community. So the 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, or that if you fill in this form or that form, everything's okay. Litigation is too



expensive for the consumers to have recourse to it, so it has become largely statute-based.

103. That brings us to your 1984 *Company Law and Commercial Reality*, Sweet and Maxwell, and I wonder if you could tell us something about the background to this book?

Yes, Professor Roy Goode¹⁵ was Dean of the Law Faculty at Queen Mary College in London in those days, and he was very fond of organising seminars and conferences and so on, and he introduced a series of lectures for the city practitioners to come after work on a Friday at 5 o'clock and he gave a lecture or a series of lectures - I think it was usually five - over the winter months, and he very kindly invited me to give one of those series' and so I naturally took company law rather than anything else and I gave five lectures, and I think part of the deal was that the lectures were published as a book at the end of it.

104. You were scathing about the policing of companies and you said that on page 14 commerce needs, I quote: "Less mollycoddling from without and freedom to find its own way." Do you think that things have improved since 1984?

Oh, vastly. The Companies Registry was very slack in those days. It didn't bother to chase up if people didn't keep their documents up to date. It's now much better resourced, it's all gone electronic. You can access most of their records online and companies are toeing the line because it's on the ball, it chases up defaulters. They pay big penalties if they're late filing and so on, so that's all been sorted out, so as far as the practical running of companies as a system, that's all been improved beyond measure.

105. You also made the point that English law has placed ever increasing burdens on companies in strong contrast to the relaxing of laws in the United States and you gave the example of buying back your own shares. Do you think that this gulf has continued to increase?

Most of the big problems of that kind have been faced up to. We had a Law Review Commission or Committee set up, which I sat for a long time with - six or eight years, I think - and came up with a large number of books of recommendations and so, for instance, maintenance of capital, *ultra vires* doctrine, many of these mainstays of the old law have gone, but they have been replaced by hugely complicated and hugely elaborately worded statutes. I remember I counted the number of sections in the first Companies Acts and I think by the time I gave those lectures I 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 documents, but there are now 1,300 sections in the Companies Act and 16 schedules. That's massive, so there's a verbosity there and overelaboration of sanctions and so on, which they've managed to do without in the United States. But the Business Corporations Act in the United States which is the foundation of legislation in almost all the 50 states. I can't remember now, but it's under 50 pages, I think. I remember Canada enacted its corporations law about the time I was writing and it gets the whole of the law into under 100 pages, and they are more advanced in many ways. We've taken on many of those steps which we call advancement, but haven't done it in a way which is efficient in its use of words, doesn't trust business to get on with things, doesn't trust the judges to make sense of the legislation, spells out what a judge must say and so on, in a hugely extraordinary verbose way.

¹⁵ Sir Royston Miles "Roy" Goode (1933-) Crowther Professor of Credit and Commercial Law, Queen Mary College (1973-89)



106. Professor Barry Rider in your Festschrift selects a quote from your 1984 book *Company Law and Commercial Reality* saying you “...bemoaned the lack of imagination...” just to quote, “...in the regulation of companies and so little had been done to improve the law since 1844.”

When I was speaking, because the *ultra vires* doctrine had not been squarely dealt with, maintenance of capital had not been properly dealt with and so on, perhaps not a lack of imagination, but just the will to make change was just not there and even in the latest 2006 Act as a result of that recommendation, and also as a result of brakes being put on things from Europe. We still haven't gone as far as we ought to in introducing for instance no-par-value shares and so on. They won't let us do it because German law and French law have always been rather more restrictive than ours.

107. I was reading recently in a paper co-authored by Professor Cheffins that Delaware Chancery Court is losing out on court cases related to company law¹⁶. Is this something that you would expect with...?

I'm not quite sure what the reason for that is and I haven't been able to lay my hands on the article. What they may have been saying is that there is so much expertise in company law focused in Delaware these days among the practitioners of the law, the barristers, the attorneys, the accountants and the judges themselves, that things have been worked to a point where it's not necessary to litigate. You can settle things out of court and get on with business - I think that's probably one of the reasons.

Delaware started as being one of the most liberal Corporations Acts in the States, so that's why it attracted business, because it had fewer and fewer restrictions on what people could do, but it also brought into play a highly developed discipline from the courts there which was making sure that the race to the bottom, as it was sometimes called, the race to the most liberal regime didn't lead to abuse. So their corporation law has been developed way further than anybody else's. Far more people understand it there than they would in the backwards States and so on. California's not too far behind them but it does mean that things have been worked out, to a degree, where there's so much less risk to litigate. Also, the professional standards are so high that it's not easy to use Delaware to launch a great fraud scheme if you want to, because the professionals wouldn't touch it. So I think it's a story of success rather than anything else that's led to less litigation, but I'd like to see the article and see exactly what the point is that they were making.

108. Perhaps we can dig it out later.

Well, it's probably gone off for binding, but either way it will be on the web somewhere.

109. Professor Sealy, and that brings me then to your 1986 *Disqualification and Personal Liability of Directors*¹⁷. It is now on its fifth edition - this appeared in 2000, so that is more than one edition every three years. Obviously it's a very popular subject and a very useful handbook - do you think perhaps bought by directors covering their tracks?

Mrs Thatcher, or Mrs Thatcher's Government, enacted a radical new insolvency act in 1985, 86, really the first serious look at insolvency law since Dickens. That's how radical it

¹⁶ Armour, Black & Cheffins, *Indiana Law JI*, 87, 1345-1405

¹⁷ Croner CCH Group Ltd, 3rd Revised edition (July 1989) 108pp.



was. And the publishers discovered at a rather late stage that there was nobody writing books on it, and practitioners on the whole are rather too busy to tackle it, so the firm CCH Editions approached me and said would I get the subject up, because it wasn't a subject I'd ever taught, and I said I'd get up the corporate side of it. And at the same time they approached David Milman¹⁸ at Manchester and he said he'd do the personal bankruptcy side of it, and we wrote this book commenting on new legislation without ever having met each other even when it came out, but we'd exchanged manuscripts all the time. And then to everyone's consternation, at the end of 1985 it was announced the government wasn't going to bring the legislation into force for a whole year, and the lady running the publisher's side of things rang me up and said what are we going to do? I've just spent £1,000 on designing the covers and it's all going to be have to be junked. And I said well they are bringing just a little bit of the Act, about 20 sections into force, on the disqualification of directors. She said I'll use that for the cover design.

And so we had a great deal of trouble padding the material out sufficiently wide to be able to get lettering on the back cover, on the spine, so there's all of 32 pages there, or something like that, I think. It was a novel idea, disqualifying directors, and it was the only thing that really took off when the new legislation came in. And I think you're quite right in suggesting it maybe directors who bought it because they were scared of being disqualified themselves. It was a small book and it was cheap, and it served its purpose until by 2000, was it? First of all, it was all in the main book, which was by now published, and secondly, other writers had got books out as well, so there was no need to keep that one going because it was in the main publication, which came out a year later.

110. And you document a remarkable increase in cases of disqualification orders – 60 in the first seven years since the insolvency legislation came out, but by the year 2000 you say 1,400 orders a year. I wonder why that was?

Very simply, the Government was persuaded to put resources into developing this branch of the law. There's always been a number of scandalous stories in the papers and parliamentarians say we must be doing something. The media says why isn't there something being done? So eventually the government decided they had to, so part of the Department of Trade and Industry as it was then called, was set up with a Directors' Disqualification Unit, and it was given funds to bring prosecutions under this legislation, and at the same time they introduced rules that said every liquidator and every receiver who was appointed in a corporate insolvency had to send a report to the Department of Trade saying if any of the directors had behaved in a way that they thought needed investigation and the money was just devoted to developing this area, so that's why it did take off.

Since then, the big change that's been made is it's no longer necessary to get a court order to have a director disqualified if he's prepared to plead guilty, or at least to agree to give an undertaking that he would not be a director - that's a substitute for going to court. That takes off all the expense from his point of view, the stress and the delay and so on which would be involved if a court case was involved in every case. There are safeguards in place to stop it being used as an instrument of oppression, but the disqualification order made by the court has now given way to an extra judicial way of dealing with corporate incompetence and corporate fraud and it's worked very well. I don't know quite what the numbers are per annum now – I could look it up very quickly - but it's in the thousands.

¹⁸ Professor David Milman, (1955-), University of Lancaster Law School; Dean of Law, University of Manchester (1995-97)



111. It would be interesting to know. You say on page five of your book, the legislation, and I quote: “...changed the business culture of the country.”

Oh, certainly. Directors were for the first time aware of the need to keep an eye on things because the main emphasis of the disqualification regime is not on deliberate wrongdoing, but on incompetence and not seeing ahead of trouble that the company is going to become bankrupt and taking advice and doing something about it. The alternative usually is to put the company into administration, which means that the company carries on trading or at least it trades until a new buyer can be found for the business instead of liquidation. So directors are now forced to think when things are getting a little sticky that it may not be light at the end of the tunnel, but they may be heading for the precipice, get legal advice and if they do that, they will avoid the risk of disqualification, but if they don't take it seriously, that's always a threat. So it has changed the culture, yes.

112. I was interested in a comment that you briefly made on page five that some of the court decisions were being taken to the Court of Human Rights to challenge the fairness of UK disqualification procedures, and I wonder what the current state of play is here?

It's pretty well settled down now. It is established that it's not a breach of human rights to be disqualified as a director, so the most recent cases which have gone to the court in Europe have been about mishandling of the case, perhaps not bringing it for seven years and the chap been waiting a longer time than necessary to find out whether he's to be dealt with. But the idea that a person can be disqualified from running a company because of misconduct is not a breach of anybody's human rights. It's a perfectly ordinary sanction and the European Court has said it's not a punishment under the criminal law, it's a civil sanction imposed in the interest of the public rather than anything that... or put another way, any infringement of human rights is consistent with the object of the law and the protection of the public. So if they do go to the Court of Human Rights now, it's about some slip-up in procedure – being tried twice for the same offence and that sort of thing, and not because the legislation itself is inherently unfair.

113. Right. That brings us to your *Commercial Law Text Cases and Materials*¹⁹ with Professor Hooley²⁰, first published in 1994, now in its fourth edition 2009. I wonder if you could tell me something about the background to writing this book?

Yes. I suppose it goes back to John Thornley²¹ of Sidney Sussex College, who taught a course in personal property for a long time and then it became a course really on commercial law with a greater emphasis on transactions rather than the property aspect. So he taught assignment of rights, negotiability, sale of goods, of course, and insurance. I don't know whether he did teach insurance, but anyway, across the board he taught that and he had some very good notes which he handed out, and to some extent I inherited those. Richard Hooley and I, between us, were sharing the lecturing on commercial law and we thought that a book on the same lines as the company law book and published by the same publishers would go down well with students, so Richard's done two-thirds of the book and I've only done one-third, so it's rather an injustice that my name comes first in the authorship. We are currently working on a new edition.

¹⁹ OUP, 1416pp, 2008, 4th Ed.

²⁰ Professor Richard J. A. Hooley, (19xx-) Kings College London

²¹ ?



114. I wondered about that. In the 1994 preface on page 7, you said, I quote: “If there is one branch of English law which we can be justly proud, it is commercial law.” Yet in the 2009 edition, on page 50, you cite a 1998 paper by Professor Goode²², where he discusses the state of English commercial law in the international arena and its challenges for the 21st century, and he is, and I quote: “...depressed by the state of our statute book and by our inertia in the complacent belief and the innate superiority of English commercial law, while Americans take the health of their law seriously indeed.” Can you comment on what appears to be here a bit of a conflict of views?

Yes, I can think of areas of the law where I agree entirely with everything that he’s said. For instance, security of 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 - your photocopier or your digging machine or something may well still belong to the person who supplied it to you under some form of lease or retention of title agreement, and so on. We’ve never 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. It’s worked smoothly and perfectly. We’ve had recommendation after recommendation by consultants and committees and by the Law Commission here that we must take that sort of thing on board so that we don’t stick to elaborate artificialities like hire purchase which were proved to be judge-proof in the 1880s, so we’ve done it that way ever since without saying there’s a more straightforward way to do it.

Since then, New Zealand, Australia, Canada, almost every other mercantile country in the Commonwealth has gone the American way, hugely simplifying the law, but we haven’t bothered to do it. I don’t think he was really looking quite so much at the area I was emphasising before about shiploads of grain or whatever because that has largely been handled without statutory intervention. He would probably have been focusing rather more on other aspects of the law where we have never had a statute intervening to straighten things out.

Now, just recently, this very last month, we’ve introduced a new system for the registration of company charges. It’s not a new system at all. It’s the old one in new language, and it is again a denial of the need to go down that road with personal property security, which was recommended to the government, but they’ve fought off it. They’ve just not got the will to go through with a simple, straightforward radical change of things. I went out to New Zealand a few years ago to teach a graduate course on insolvency law and I discovered that almost all the favourite subjects that I was going to focus on had been eliminated by this one statute so I had to teach company law instead, and the idea that you can simplify law by a radical rethink is a very hard thing to get across to the professions and the legal draftsman here, and it’s always been a subject of some despair.

115. So having spoken about your books on company and commercial law, Professor Sealy, can you touch now on your contribution to the topic of insolvency? In 1987, you began the production of the *Annotated Guide to Insolvency Legislation*²³ with Professor David Milman²⁴. Now on its 15th edition 2012—

16th as of this week.

116. 16th this week. I wonder if you could tell me a bit about the background to the

²² See Q103 fn 13

²³ Sweet & Maxwell

²⁴ University of Lancaster Law School



writing of this guide?

Well, I did explain that when the act of the 1980s came into force, or was about to come into force, the publishers discovered that they needed some authors and CCH Editions, as it then was, approached the two of us to write this, and we got off the ground first and it's been a leading book ever since. It's great to go to a conference and see everybody open his briefcase and put the blue and green book on their desk and you think well that's filling a great need.

So it has now got rivals, but they're playing catch-up.

117. Presumably a growth area in times of recession as well?

Oh, yes. Yes.

118. Professor Sealy, if we can now move from talking about your publications to your own commercial activities, and one of the items that you mentioned in your notes which you kindly sent me, was your work as a consultant on the reform of company law in some Commonwealth and other countries, and I wonder if you can describe this type of work?

I think this probably started through my connection with Barry Rider who, at that time, was working for the Legal Affairs Division of the Commonwealth Secretariat²⁵. Certainly, the first invitation I got was from the Secretariat. Malawi needed funds from overseas investors and they wanted to invest in Malawi companies, but the Companies Act dated from 1913 and just didn't allow the flexibility and scope for major conflicts investments and so I think they appealed to the Commonwealth legal people to say could something be done and I was invited to go out and really draft them a new Companies Act from scratch.

It was a considerable eye opener to me. I went round to see the Companies Registry and they said well I'm afraid two-thirds of it has been eaten by termites so we don't have the records any longer. Now, I had a very good mentor in that there was a retired colonial legal draftsman living in Malawi who was still giving a certain amount of guidance to them, and I looked to him for advice quite a lot on the technique of drafting and then I looked around the Commonwealth for precedents to borrow suitable for a relatively undeveloped country - undeveloped in the sense that I don't suppose there was ever a judge who'd heard a company law case and perhaps ever heard a civil case because they were mostly concerned with criminal law and family law and inheritance matters. I think there were about five accountants in the country - half of them trained in South Africa and half of them trained in England and they didn't agree on what kind of accounting structure should be introduced. You knew that the law had to be more or less self-standing because nobody would ever write a text book on it, there wouldn't be a market. So it was that kind of aspect which would prove to be a challenge. Professor Gower²⁶, who was the doyen of company law lecturers in this country, had recently done a similar job for Ghana, but Ghana was a country where there's much more further developments in commerce and I think they were up to a rather more sophisticated act and I think anyway they wanted one that seemed to be sophisticated and, in fact, the instruction was it had to be at least 350 sections long. So I didn't copy that altogether and I thought he was also rather too strict, and that what the people wanted was

²⁵ <http://www.thecommonwealth.org/Internal/151470/lcad/>

²⁶ Laurence Cecil Bartlett Gower, (1913-1997), Sir Ernest Cassel Professor of Commercial Law, LSE (1948-52), Professor and Dean of the Faculty of Law, University of Lagos 1962-65, Vice-Chancellor, Southampton University 1971-79



some enabling encouragement to get into commerce, so I had that kind of approach. I think the Act is still in force in Malawi. I did enjoy my trips to Malawi. The people are such lovely friendly people. I made some very good friends.

119. Did you encounter any idiosyncrasies that set some countries apart? I'm thinking, for instance, the Sudan which presumably has Islamic law?

Oh, again, Barry Rider was involved with this. He and I and a barrister from London were set up as a team to revamp their law. We didn't go there – they sent some legal officers, Solicitor General and one or two others to us for a summer. What we didn't realise was it was on the brink of a military coup and that the country was going to be taken over by Islamists who were going to impose Islamic law in place of the English Common Law which had been the law up until then. The upshot was that our project fell through and the legal experts who came here to give us help didn't want to go home. So that was another eye opener.

And then I went to Vanuatu. I think this time it was the World Bank - somebody else anyway - invited me to go there. I thought I was going to a Polynesian country or Melanesian country where numeracy and various other things were not highly developed, and somebody said – I think it was in Tonga there's no word for mine and yours, no word for more and less, and the counting goes one, two, three, plenty! I was surprised when I got there to discover that it was an offshore finance centre with a shipping registry and a tax haven, and I wanted a quite different set of precedents to work on. But the reason I was there was because it had been a condominium, a joint administration of the French and the English ever since the end of World War I and they'd had a referendum and decided that it should no longer be a French administration, become a Republic within the British Commonwealth and so all these institutions should be British, and the French one should convert to British, so they had a French Companies Registry and an English Companies Registry, so we had to draft a suitable thing in English for the French companies to adopt when they changed over. But French was still an official language as well as Pidgin, so anything that we drafted had to be translated into French at the same time. And they brought a Canadian lawyer from Quebec, a young man, to do the translating and my first suggestion was well why don't we just enact the law of Canada as a basis because it's already in English and French, and he was very opposed to this because he'd be out of a job. Then shortly after we discovered he wasn't doing the job, but he'd found a bilingual girlfriend who was doing the work for him while he went scuba diving. So the reaction of the law officers surprised me extraordinarily. They didn't take offence at all. They simply sent a government car out to bring the girl in and made her swear to the Official Secrets Act and let her go. So I had a lot of fun in my legislative drafting.

What it did mean is that I looked at the Companies Acts of a very large range of legislation in the United States, Canada, Australia and so on, and I also did some teaching in Australia and had a background of New Zealand, so I got more and more curious and more and more interested in making comparisons. This led to the series called *International Corporate Procedures*²⁷, which I think you've got on the list, which is a three-volume collection of aspects of company law in the 60 or 80 jurisdictions which a businessman wanting to start a business in a foreign country or open a branch or set up an offshoot in a tax haven and so on can look up and see what he has to do and what the rules are, what it will cost and who to consult and so on. So for some time I was trying to keep an eye on the

²⁷ Professor Sealy was General Editor of *International Corporate Procedures* of Jordan Publishing from 1999-2005. <http://www.jordanpublishing.co.uk/publications/commercial/international-corporate-procedures>



company laws of all these jurisdictions. I gave that up after I retired, but it's still going, I'm pleased to know. Peter Xuereb²⁸ do you know Peter Xuereb from Malta? I think he's now the editor of it. He's been a visiting Fellow here.

120. I've met him. But in general, I assume that company law attracts the attention of commercial companies, obviously far more than, say, legal history, for example, and I wondered whether you were you not ever tempted, Professor Sealy, to become more of a commercial lawyer, which is far more lucrative, and leave academia. I know that Professor Jolowicz²⁹ had to make a hard choice early in his career to be an academic.

Yes, I did have the same choice. We'd been in Australia. I had a visiting post at the Institute of Advanced Legal Studies in Canberra for a year, and just before we left Australia, they offered me a job which was a very attractive job. My wife's English, I'm a New Zealander, and the one thing we thought didn't make sense was to live in a third country, so at that point I had to decide whether I was going to back to New Zealand into practice or come to England and stay on in Cambridge, and for various reasons we decided to make it Cambridge. We'd bought a house, we'd got children started school here and that sort of reason. My parents in New Zealand had died. My wife's parents were young and fit in England, so there was every reason to come back, really.

It didn't ever at that stage cross my mind that I might be admitted to the English Bar or become a solicitor in England. I was quite content with the Cambridge life and so I never have taken that step.

121. Another area that has interested you generally speaking is matters fiduciary, and in this regard I have had the pleasure of interviewing, as you know, Justice Paul Finn³⁰, and his involvement in fiduciary law caused your name to be mentioned several times, and I wonder if I could just follow up on one or two of the issues that he raised. He came to Gonville and Caius in 1971 and he said in his interview, question 6: "I had a friend here who was taught by Len Sealy, who was Caius, and he told Len that he had a friend who was interested in fiduciaries, and it was Len who got me to come here." Can you expand on this?

Yes, I think he did a Masters in London. He had had one postgraduate year anyway, and for some reason or another, he was introduced to me or he came to see me and we decided that it was something that he could very well do and so I spoke to the admissions people in Caius and he came to us. I stirred up the beginnings of an interest in the development of the concept of fiduciary obligation doing my directors' duties work, but I didn't think to turn it into a book. I did publish key bits of it as articles in the *Cambridge Law Journal* and that's how he would have come to hear about it³¹. He went into the subject in a huge way, massive research, and wrote the definitive book³², which is always missing from library shelves – I think it's a very hard book for that reason to find in the library, because somebody's always nicked it, or borrowed it.

And he put the subject on the map, and it was then taken up quite enthusiastically, I

²⁸ Peter Xuereb, Professor of European and Comparative Law, University of Malta

²⁹ Professor J. Anthony "Tony" Jolowicz (1926- 2011), Professor of Comparative Law, University of Cambridge (1976-93).

³⁰ Justice Paul Finn, (1946-), Judge of the Federal Court of Australia (1995-), Goodhart Professor 2010-11, Professor & Head, Department of Law and Division of Philosophy and Law Australian National University (1988-1995).

³¹ 1962, *CLJ* 119; 1963 *CLJ* 69; 1967 *CLJ* 83.

³² *Fiduciary Obligations*, Law Book Co (1978).



think, by the Australian judges, Australian High Court developed the subject in a number of key cases and then it took off round the world and now it's almost a subject of study in its own right. There have been several books published on it – none of them as good as his.

122. One of the things he has said and I quote: “I owe a real intellectual debt 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. It was a very important stepping stone along the way. Len was my supervisor for part of the time.” What was the part of the time?

He came to me as a company lawyer really, and he then got further and further or deeper and deeper into this subject and I thought after he'd done one year with me he could go to an equity lawyer, and that was Gareth Jones³³, so although I kept in touch with his progress after that and read drafts of his work, Gareth masterminded the final two years of his thesis, and I think it was a great benefit to him to have me with more of a commercial background and Gareth with the equity background and also one in restitution, that he was able to bring the subject to the high level that he did.

That's not the only time I've done so much of a job with a research student and then said now I think you'd like a year with somebody else to round off his subject, and I think it's a thing research students should be encouraged to think about, or research supervisors, especially in the interface between two different traditional branches of the law, to get somebody who is getting a foot in both camps means that he's getting...

But I think he's wrong to say that I should have written a book on fiduciary relations because 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.

123. That brings us to some general matters. In the Festschrift to honour you, a couple of the contributors raise some fascinating topics and I wonder if I could just explore a few of these. Mrs Justice Arden³⁴ mentions your involvement with the Law Commission reforms in, to quote: “...the complex, cumbersome and outdated English Companies Legislation.” What was this relationship, Professor Sealy?

I did do work for them. I didn't do paid work for them. I was consulted on a number of occasions and I remember particularly on the law of partnership; they also did a report on directors' duties. I went down for the odd seminar. I went on the odd day to talk to somebody, but I wasn't actually a consultant. I did do work as a consultant for the New Zealand Law Commission when they drafted the new Companies Act, and there again, I think I had got a good background to make input. They did enact a Companies Act which is a model of straightforwardness and it's been very successful, I think. One or two points of difficulty have arisen which we didn't foresee, but on the whole the mainstream companies law that they've put in place I think has been very successful.

124. Barry Rider raises several issues and quoting him, he says: “Len has never espoused or supported the parochial attitudes of some of his less inspired colleagues.” I wonder if you could comment on that, any ideas what he's alluding to?

It may be that when I started teaching here, the courts were very reluctant to look at any jurisdiction outside England for sources of authority. Now, these days, they're always citing the Australian High Court, and American courts even, with considerable willingness, but I know when I did the first edition of *Benjamin* I was told not to put too many

³³ Gareth Jones (1930-), Downing Professor of the Laws of England (1975-98).

³⁴ Justice Mary Howarth Arden, (1947-), Court of Appeal (2000-).



Commonwealth authorities in the footnotes because barristers would get rubbished by the judges if they quoted them. That's probably what Barry was thinking about.

Of course, in the time that I've been teaching, it's got stood on its head completely. I was actually put in as an editor to *Gore-Browne on Companies*³⁵ to add references to companies legislation, companies judgments throughout the Commonwealth, to what was already in that loose-leaf and update it four times a year. So the world has come really quite a long way round. We have had Australian and New Zealand judges used to come and sit on the Privy Council - they don't do that any longer, but that was another source of cross-fertilisation of ideas which has done us nothing but good, I think.

125. Yes. He also said, Professor Rider, and I quote: "In some quarters, company law is even considered to be lacking in the sort of intellectual rigour that characterises real scholarship." What quarters does he mean?

I think probably generally, I know... I mean this was probably the attitude of academics, there was a Companies Act and therefore you didn't have any particular case law to look at, that sort of idea.

When I did company law in New Zealand it wasn't thought a big enough topic to be the subject of a paper, so we had company law and partnership. When Bill Wedderburn³⁶ introduced the subject here, he couldn't persuade the Faculty to have one called company law, but one which was called the law of corporations, and he brought in trade unions and all sorts of non-corporations to give it enough width. The big breakthrough came with Professor Gower writing his book because it first of all covered the subject across the board and wasn't a commentary on the Companies Act, if you see what I mean. He was a scholar of absolutely top order, asked a lot of questions. He'd come from a practising background which also, I think as with Roy Goode, made a huge difference to his attitude to the subject. He came in with a great brain but a practical background so he could open up the subject to debate in all sorts of areas.

But it is quite interesting that the first edition of his book had almost nothing to say on directors' duties and that was my thesis, is now a fat a chapter as any other one in the book, so there was case law there to be unearthed if somebody took the time to go into it. So it's now quite the reverse of the point Barry's making. It is an area where contract, partnership, equity and so on all meet, and they have different approaches to things to reconcile.

The same thing has happened in restitution which has a background half in the common law and half in equity. Restitution suddenly had to fill itself out as a rounded subject, and in insolvency law, of course, it is the same thing. Insolvency has got the added feature that there's going to be no compromise – you either get the money paid or you don't. They don't settle insolvency claims like they settle tort actions, so a lot of things go to court to be litigated and for difficulties in the law to be resolved.

I think the only subject that probably has a bigger academic challenge is conflict of laws, where you've got different jurisdictions completely, different legal philosophies coming into conflict with each other, and that does call for huge intellectual perseverance. Kurt Lipstein³⁷, of course, is the ultimate example of that. So I've never been a one-subject-man, but I have been in an area where subjects coalesce and conflict, and that's the great challenge there.

³⁵ From Jordan Publishing. Started in 1873. <http://www.jordanpublishing.co.uk/publications/company-law/gore-browne-on-companies>

³⁶ Kenneth William Wedderburn, (1927-2012). Baron Wedderburn of Charlton, Labour politician, lecturer in law at Cambridge, later Cassel Professor of Commercial Law, LSE.

³⁷ Professor Kurt Lipstein (1909-2006), Professor of Comparative Law (1973-76).



126. Also, Professor Rider in your Festschrift said that your views were, and I quote: “...so refreshing...” and he cites your handling “...of the undeveloped state in our jurisprudence of a concept of opportunity as a property, actual or potential,” as pragmatic, and I wonder if you could enlighten us, Professor Sealy, and say how you came to this view?

I think the cases I’m referring to were each cases where a company was on the point of developing a 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 himself³⁸. 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 these days. 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 being capable of being the subject of ownership, the existing law would have been sufficient to cope, but the existing law didn’t cope, and so it had one case where they had common law authorities cited to them and they’d say, “There’s nothing we can do,” and another case where they had trust property cited and they’d say, “Oh, yes, we’ll deem it to be a trust,” and so you’d get conflicting answers. The development of the law of restitution has certainly coped with that particular problem now and corporate opportunities is now in the Companies Act as something you mustn’t do is pinch ideas from your company while you’re a director owing fiduciary obligations. So the potential was there for the law to develop, but they just hadn’t seized it.

And, again, I think we had judges that had never talked to each other - Chancery judges and Common Law judges - and they didn’t understand each other’s way of thinking or anything else. Company law was an area, of course, where they needed to do this.

We had judges brought up in the law of conveyances and trusts and settlements and so on in the Companies Court who’d never really sat round a board of directors, and that’s gone now because the Company Law Court, the Company Law Bar, is staffed by people of formidable commercial experience now.

127. It’s very interesting. Professor Sealy, since retirement, what have been the highlights?

Well I’m still writing one book. I think I had seven titles with my name on when I retired, and gradually they slipped away one after another, although I keep an eye on some of them that have still got my name on. I enjoy keeping in touch with the Faculty and college even if it’s only by email a lot of the time. I’m still a member of the Faculty and a member of my college, which is nice. I still do a lot of travel and I usually look up the Law Faculty if it’s in a country where I know people there. Grandchildren keep me going, and watching them develop. We live in The Cotswolds, which is a marvellous part of the country for tradition, scenic opportunities. It’s only ten miles to Stratford-upon-Avon so you can keep up the theatre there, and so on. My wife’s a very keen gardener and I follow in her wake hammering in posts and things. I’m not looking in my spare time for things to be done; it’s the other way around.

128. I had no idea that you were such a strong comparative lawyer, as well as all your other things.

³⁸ E.g. *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378.



I don't have the languages to do traditional comparative law. I did have one research student in Quebec who asked if I minded him submitting his draft in French and that was fine until he came to submit and he had to submit in English, so he translated it into English and I saw flaws in his reasoning that I'd never been able to see through the elegance of his French. I was completely bowled over. I've had reasonable French so far as reading and writing goes and I can get by a little bit in Italian, and I have no German worth mentioning, so I've never been tempted to go down that road, but in the English speaking world, of course, there's plenty of contemporary comparative stuff which you can do and say "look they've just invented this or invented that, or abolished that, why don't we think of doing it ourselves"? So comparative in that sense.

I've never been in the tradition of the researchers who collect ancient data and ponder over it, or jurisprudence theories which they develop.

129. I was reading recently that apparently the Australian judiciary attracts a very high calibre of judge intellectually, because of the whole appointments—

Lots of differences. They don't mind having articles simply being cited to them in court, being referred to articles to go away and read themselves. You'd never do that to an English judge.

In fact, in [*the*] old days in England if you wanted to refer to an article, you literally read it out and said you would adopt it as your argument. If there was a living author, you didn't dare mention his name unless it was Goodhart or somebody who was outstanding, because you were not regarded as an authority until you were dead, that's quite literally true.

And in Australia they put footnotes in the judgments indicating how much they'd read. In fact, I remember talking to a Judge called Priestley in Australia saying something about this and he sent me a judgment in which he cited 18 different authorities or articles in his footnotes and said, "See."

They've almost all got research....what do they call them?.... judge's clerks or something like that, who will be on their way to Cambridge to do a PhD or something similar. They've probably just done a year in practice, qualified, and then are wanting to do... and we do send people to the Law Commission here doing the same sort of thing and I think it's great training to see a judge thinking – a judge even perhaps discussing with you - which way his judgment's going to go.

They are very well informed and they've had some cracking good judges like Tony Mason³⁹.

130. I was just thinking, yes.

And he's always been one who looks wide and far afield. I think most of the judges have probably had a stint in the United States at some time, which is something that opens your eyes a lot.

131. Certainly in the old system in South Africa, judges would very often cite to even very old sources.

It happens in Scotland, too.

132. Well, all I can do is thank you so much for a wonderful interview, really fascinating. I'm very grateful to you and I'm looking forward to seeing this up in the

³⁹ Sir Anthony Frank Mason, (1925-1995), 9th Chief Justice of the High Court of Australia (1987–95), High Court (1972-95), Chancellor, University of New South Wales, 1994–99). Goodhart Professor 1996-97.



archive. Thank you so much. It's been wonderful.

Well, thank you for the opportunity to come and talk to you about it. It's been lovely.
Thanks.

