

*THE LAW OF CONTRACT (AND SUPPLEMENT)* by D. W. Greig and J. L. R. Davis, The Law Book Company Limited, 1988. \$95.00 (HC), \$69.00 (SC) and \$12.50 (Supp).

This work on contract law has made Australian cases and reasoning the focus of its treatment.

The authors approach their subject with the intention of relating decisions and statutes to local conditions, and adhere to this sub-text throughout. This is not to say, however, that they eschew an analysis of relevant English decisions or fail to make valuable use of United States and Canadian authorities and legal writings. This breadth of view has made the Australian aspect the more interesting. Such an orientation of the treatment is a notable step in Australian writing on contract law. Throughout this work (which is of Tolstoian proportions) the authors amply justify their claim that "... there is still room for a distinctive Australian contribution to the common law of contract" (Preface V).

In reviewing a work of this scope, it is possible only to highlight a number of points. The book is a scholarly work written by authors who evince a deep interest in their subject. It is distinguished by its limpid didacticism and is well balanced to meet the needs of its various readers. It would be valuable for a practitioner preparing submissions for a High Court appeal on a point of contract law principle, for a law student, or for a busy practitioner seeking no more than a quick brush-up on a particular point. The text is made easier to read by the decision to repeat citations and do without footnotes. Although this has added to the length of the work it avoids the problems which arise if there is extensive cross-referral to earlier citations.

The English historical underpinnings of contract law are examined in detail in Chapter 1. The historical conspectus is more than adequate although one might have expected a slightly fuller treatment of the growth of *assumpsit* after covenants and debt had become procedurally cumbersome. There is also a surprising failure to discuss account, which does not even appear in the index. This is an important topic to which modern scholars have increasingly turned: see, for example, S. J. Stoljar, "The Transformation of Account" (1965) 80 *L.Q.R.* 208.

In Chapter 2, against the historical background, the authors examine the economic and social reality of freedom of contract as it developed from the doctrinaire approach of the nineteenth century to the more altruistic views of today. For example, the peculiar conditions which affected contracts of carriage are classified and explained by reference to Australian authority with the English ticket cases operating merely as a backdrop. Such an approach is a welcome sea-change from the earlier treatments where one has seen the various pronouncements of the State Supreme Courts appended as a footnote to some disquisition by the English Court of Appeal. So, too, is the broad sociological examination given to decisions. With the increasing emphasis on policy

in the superior courts an analysis of the arguments in favour of various policy choice is especially useful. (See, for example, Mr. Justice McHugh's, "The Law-making Function of the Judicial Process" (1988) 62 *A.L.J.* 15.

In discussing the bargain theory of consideration the authors proceed as though it has been expressly adopted in England and Australia. The joint judgment of Mason C.J. and Wilson J. in *Waltons Stores (Interstate) Ltd v. Maher* (1988) 62 *A.L.J.R.* 110 at 115 makes the point that this is not the case. Indeed, the more advanced development of promissory estoppel in USA is ascribed by them to the need to cater for differences created by the adoption there, and not in Australia, of the bargain theory.

Chapter 5 provides a good overview of the various criteria by which the Court may determine whether parties intended to enter into legal relations. It may be relevant to include here a reference to *Kleinwort Benson v. MMC* [1988] 1 *Lloyds' Rep* 556 (*The Times*, 8 February 1989 unreported) in which the English Court of Appeal explores the operation of "comfort letters" and illustrates the distinctions which the authors draw.

Chapter 6 on the potentially banal topic of Offer and Acceptance is particularly interesting. The section (E) dealing with ways of resolving the "battle of the forms" will be of great use to those advising businessmen day-to-day on the efficacy of their contractual documents which attempt to override any subsequent amendment imposed by the other party.

Since Australia has now acceded to the 1980 *Vienna Sales Convention* which will enter into force in respect to Australia on 1 April 1989, it will be necessary to make consequential amendments to the text (e.g. p. 320 on postal acceptance in international sales); see the general discussion by Govey and Staker, June 1988 *Australian Law News* 19-21.

So, too, the views expressed by the authors on the appropriateness of widening the scope of relief for economic loss have been strengthened by the House of Lords' decision in *D and F Estates Ltd v. Church Commissioners for England* [1988] 3 *W.L.R.* 368 where Lord Bridge of Harwich, by confining *Albert Borough Council v. Johnson* [1979] 2 *N.Z.L.R.* 234 to its facts, has severely restricted the range of damage for which a builder who employs an independent contractor may be liable. It is not too much to suggest that this entire section will require re-working in the light of this substantial retreat from the apparent width of *Junior Books v. Veitchi Co Ltd* [1983] 1 *A.C.* 250.

Chapter 13 on Contractual Disabilities provides an excellent account of the modern law on the subject. Professor D. C. Pearce's unpublished Master's thesis on Infants Contracts, ANU Law Library, is not mentioned in the text but a reference to it in subsequent editions may be useful.

One of the more interesting chapters is Chapter 14 dealing with misrepresentation. It is, of course, an area in which Doctor Greig is an acknowledged expert, (see his article (1971) 87 *L.Q.R.* 179 cited at p.

477). The authors have wisely decided to place most emphasis on the Trade Practices Act, 1974 before discussing the position at common law and equity. This represents the practical reality that the statutory relief provided by the Act and Fair Trading legislation by the States provides a plaintiff with the most extensive and flexible remedies. The authors lack sufficient space to discuss all the trade practices aspects in detail; they are properly the subject of an entire book themselves. Cross-references to the standard works by Donald and Heydon and Harland, Vermeesch and Taperell would therefore be useful and appropriate. The authors' analysis is up-to-date and provides an accessible and accurate statement of the present law. The discussion on the South Australian and ACT legislation on misrepresentation is also detailed and, since there is little authority upon the matters the authors discuss, particularly useful.

In relation to the indemnity available for innocent misrepresentation (p. 826-827), the authors could, perhaps, distinguish more clearly between its limits and that available for fraud. It is not made clear, for instance, that the view of Bowen L.J. quoted in the text is regarded as the narrowest of the views given by the judges in the case. See *McGregor on Damages* (15th ed., 1988) p. 1114, note 98. Moreover, a reference to *Whittington v. Seale-Hayne* [1900] 82 L.T. 49 which exemplifies the difference in the scope of the indemnity for innocent misrepresentation may be appropriate.

Mistake (Chapter 15) is a troublesome topic in contract law. The alteration to the previous law effected by *Taylor v. Johnson* (1983) 151 C.L.R. 422 is neatly explained, as are the various theories supporting relief for the different types of error a party may make.

The interesting and controversial question how much of an unpaid deposit is recoverable upon repudiating breach is discussed in detail at p. 1277-1278. The discussion would be improved in future editions by reference to the considerations recently advanced by Dr. Carter in "Deposits, Accrued Rights and Damages" (1988) 104 *L.Q.R.* 207 where he made a penetrating analysis of *Damon Cia Naviera SA v. Hopag-Lloyd International SA*. (Indeed, as a general aside, all of Chapter 21 on the effect of substantial breach would be improved by cross-referencing to Carter's *Breach of Contract* [1984]).

Similarly, the damages recoverable after the innocent party has obtained a decree of specific performance (pp. 1263-1264) will need slight revision in the light of *Sunbird Plaza Pty Ltd v. Maloney* (1988) 62 A.L.J.R. 195.

Some omissions should be noted.

A question having practical importance but not discussed in this text is the extent of the obligation of the affirming party to tender performance in a case where a repudiation has not been accepted. The subject recently has been discussed by the House of Lords in *Fercometal SA v. Mediterranean Shipping Co SA* [1988] 3 W.L.R. 200.

In the light of the dispute which surrounds the point, it is unfortunate that the authors do not express their own view on whether a contract may validly forbid its assignment (p. 1020). Given the prevalence of "flawed deposits" as a quasi-security device, a discussion of the respective arguments would have been useful. It is odd, too, that the leading decision on assignment of the fruits of an action, *Glegg v. Bromley* [1912] 3 K.B. 474, is not cited or discussed at all.

It may be hoped that subsequent editions will make greater reference to articles and treatises where the various topics are treated more discursively. Although references to secondary sources are scattered throughout, it will require their systematic cataloguing to make the work entirely self-contained. To do so will require a delicate balancing of the length and importance of the areas covered. Already the supplement has added a large number of cases and other references. It will require a tremendous effort to synthesize these new cases into the text without expanding it to an unmanageable size.

Amendments will be required to bring the text up to date.

The full discussion of Equity's beneficent intervention (p. 24-25) and the enforceability of promises without consideration will require substantial reworking in the light of *Walton's Stores (Interstate) Ltd v. Maher* (1988) 62 A.L.J.R. 100 (noted by Duthie, "Equitable Estoppel. Unconscionability and the Enforcement of Promises" (1988) 104 *L.Q.R.* 362.) Since that decision was given in March 1988, it has been applied (at the date of writing) by the New South Wales Court of Appeal in *Silovi Pty Limited v. Barbaro* (1988) 13 N.S.W.L.R. 466 and in several Victorian Supreme Court decisions both at first instance and on appeal. Comparison of these decisions reflects diversity about how *Waltons* may be applied. This has led litigants to hope for success in circumstances superficially similar to *Waltons* but, actually, quite outside the range of the principle it applied. Analysis of *Waltons* and subsequent decisions in a future edition will be, therefore, a valuable service.

Chapter 17 on privity will need some re-writing as a result of the decision by the High Court of Australia given on 8 September 1988 in *Trident General Insurance Co Limited v. McNiece Bros Pty Limited* (1988) 62 A.L.J.R. 508. There the majority held that the old rules as to privity do not apply to a policy of insurance.

There are occasional stylistic infelicities which should be removed in the next edition. There is an incongruous astronomical metaphor in the Preface ("Society is in a steady state", Preface V); preciosity ("nescience" for "ignorance" p. 886), and cliché ("confusion is worse confounded" p. 880). "Black" for "*negro* personnel" (p. 993) is less ethnocentric and dated. Few boxing fans would appreciate the unbecoming gentility of "Leslie" Darcy (pp. 761, 763). There are few misprints although "fictitious" (p. 6) and "been" (p. 1277) should be corrected, as should Viscount Caldecote's name (at p. 258), and Professor Lücke's name needs

an *umlaut* at p. 9. The statement (p. 688) "The use of the term 'Emblems' is *unnecessary surplusage*" (emphasis supplied) betrays the very vice it criticises.

The index is generally excellent but it would assist if "Unconscionability" (p. 1540) were broken down under its separate constituent headings rather than leaving the reader to check each of the twenty-two separate page references for the particular aspect required. The supplement is not indexed and does not provide for consequential amendments to the index in the text.

The text itself is well-printed and the various topics covered in the chapters are further sub-divided by individual sub-headings which makes it easy to follow the argument and narrative. The only printing defect which mars the text is the infrequent, but glaring, widow (e.g. at the bottom of pp. 9, 57 and 286).

This is now the leading work on Australian contract law. The discussion is lucid and the authors' own criticisms and comments are melded into a seamless *récit*. In writing on the basis that Australian contract law is now sufficiently mature to justify its own detailed and unique treatment, the authors have amply demonstrated that proposition.

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