

THE INTERPRETATION OF CONTRACTS IN AUSTRALIA

BOOK LAUNCH

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29 November 2011

It is a pleasure to be here this evening and a privilege to be invited to speak at the launch of this very useful publication.

I recently read a list called 'The Shortest Books Ever Written', which had been compiled in jest. It included titles such as: 1000 years of German Humour, Successful Royal Marriages, Who's Who in Puerto Rico and Career Opportunities for Philosophy students. Once upon a time, a book on contractual interpretation might also have appeared on that list.

Contractual interpretation was traditionally approached as a common sense area of law: if you could read and if you had a basic understanding of language it was thought that you could interpret a contract. As commercial arrangements have grown in size and complexity, contractual interpretation has increasingly been recognised as a vital area of law, and one of the most litigated.

For over two decades now, Sir Kim Lewison's English text on contractual interpretation has been the eminent text in this field. The first edition, published in 1989, filled the bookshelves of academics, practitioners and law students throughout the Commonwealth. Sir Kim's original text served us well. It was one of few texts that focussed solely on the interpretation of contracts rather than dedicating one chapter to the subject amongst a broader discussion of contract law. However, as so often happens, judges came along and spoiled things.

Principles about how contracts are formed, breached or performed are fairly well settled. However, in various jurisdictions the principles governing how contracts should be interpreted continue to create difficulties. As a result, a divergence has emerged between various common law jurisdictions in particular the UK and Australia.

This divergence was underscored when Lord Hoffmann restated clear principles which he said guide the interpretation of contracts in the UK. Lord Hoffmann signalled to the world that English judges are prepared to take into account the background

circumstances to the formation of a contract to a greater degree than had been accepted in this country. The former Chief Justice branded this shift as a shift from 'text' to 'context', a shift which remains controversial. Sir Kim Lewison's text on the interpretation of contracts, while remaining useful, now required practitioners to ascertain the extent to which the position in the UK was also the position in Australia.

Luckily David Hughes and Sir Kim Lewison have now done that for us. And they have done it in an incredibly comprehensive and accurate manner. Reading the book I have greatly appreciated the nuance that has gone into its composition. The authors do not merely state a principle. They state a principle and set out different opinions about the certainty or extent of that principle. The authors provide a realistic account of law rather than a simple and convenient account.

The book traverses all aspects of contractual interpretation. It begins with a discussion of the purpose of interpretation, provides an overview of the materials available to aid in interpretation and explains the role of law and precedent in contractual interpretation. The book dedicates an entire chapter to the meaning of words.

This chapter serves as a go-to guide for anyone wanting to know how the use of a particular word in a contract will be understood in law.

The text then outlines and summarises Australian legal principles in relation to implied terms, the canons of construction, ambiguity and uncertainty and mistakes and inconsistencies. These chapters of the text provide a comprehensive guide to Australian law, but also compare and contrast developments in this country with those that have occurred abroad.

The authors have quite obviously put much thought into making the book user-friendly and easy to read. The extensive index, the table of cases and the use of bold for key principles renders this book an excellent book for the bench and bar, able to be used in a matter of seconds to identify the key rule and authorities supporting it.

This book will have a significant impact on the practice of law in this country. First, it will aid lawyers and judges who are tasked with using Australian law to interpret contracts. Having sat on a number of repudiation cases earlier this year, a large part of which

involved ascertaining exactly what the agreement between the parties meant in the circumstances, I can attest to the value of this publication. I only wish it had been published at that time.

Secondly, this book will be of immense value to those who draft contracts. I cannot say that I have had much experience drafting contracts myself, and for good reason. Drafting a contract is an arduous task, requiring lawyers to think about every possible interpretation that could be placed upon a word or phrase and attempting to clarify the intention of the parties. At the end of that process, there is always the fear that a judge might adopt an approach to interpretation that was not understood or foreseen at the time of drafting. Those who draft contracts will now be in a position to anticipate how the other side, and the judiciary, might interpret words or phrases in a document.

Writing a book such as this is no easy task. Sir Kim Lewison has had a few dress rehearsals since 1989, but David Hughes went into the project blind. He should be admired for his courage and commended for the significant contribution he has made to the practice of law in this country. I would like to congratulate and

express my thanks to both authors for this fine piece of work. I look forward to seeing it used in court.