

THE HON T F BATHURST AC
CHIEF JUSTICE OF NEW SOUTH WALES
BOOK LAUNCH
'HEYDON ON CONTRACT' BY J D HEYDON
THURSDAY 5 SEPTEMBER 2019

1. I would like to begin by acknowledging the traditional custodians of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their Elders, past, present and emerging. We acknowledge this connection not as a mere formality, but as a sign of ongoing respect for their culture.
2. Contract law underpins the working of many aspects of our society, both commercial and otherwise. It is little wonder that many books are written on this topic. A large number are simply updated editions of older works: trusted, respected and useful, but not usually offering much novel or innovative analysis. Some focus on particular topics. Others may be simply polemics, the attraction to the reader depending on whether he or she agrees with the author's point of view. The magisterial work the subject of this launch does not fit into any of these categories. The somewhat prosaic title, *Heydon on Contract – The General Part*, undersells its scope.
3. A reader who skims quickly through its pages will discover that it covers topics as diverse as the reliability of the postal system in Victorian England,¹ the ideals of the student revolution in France in 1968,² the military genius of Napoleon I,³ and the polemical oratory of Cato the

¹ J D Heydon, *Heydon on Contract: The General Part* (Thomson Reuters, 2019) 63 [2.520].

² Ibid 431 [10.130].

³ Ibid 366 [9.790].

Censor,⁴ in addition to one or two principles of contract law on the side. But, if they peruse more closely and are more persistent in their study, there can be no doubt that they will profit greatly from the most lucid expositions of the law of contract ever published in this country.

4. On one view, this could hardly be considered surprising, given the author's distinguished career at the bar and on the bench. However, it must also be regarded as a significant achievement, given the number and the extent of the controversies in which even basic principles of contract law have become embroiled in recent years. Sometimes, these debates about the law can be a useful means of identifying potential deficiencies where change or reform is needed. Other times, they only succeed in muddying the waters. Ultimately, the time comes where there is a need to take a step back and evaluate where the debate has taken us. This can be difficult when both sides argue with the zeal normally only on display by two crowds of supporters at the SCG on a Friday evening.
5. This book does not only take a step back, but undertakes the extraordinary task of dealing with every aspect of Australian contract law. Perhaps the only comparable work is volume 1 of *Chitty on Contracts*. However, volume 1 of the 33rd edition of that work was the work of 10 authors, numerous editors and sub-editors. For one person to produce an equivalent work, to say the least, is extraordinary.
6. The first part of the book takes the reader through all matters relating to the formation of the contract, including the critical questions of intention to contract, certainty, consideration and the impact of the *Statute of Frauds* and related legislation. His treatment of *Masters v Cameron*⁵ and the expression "subject to contract" is a clear explanation of these issues⁶ and one which will provide invaluable assistance to practitioners

⁴ Ibid 374 [9.920].

⁵ (1954) 91 CLR 353.

⁶ Heydon (n 1) 91 [3.100] ff.

and courts who regularly have to grapple with them. He deals in detail with circumstances where the stipulated machinery to settle contractual terms fails. He deals with the question of whether and when the existence to perform an existing contractual duty constitutes good consideration with an extremely helpful analysis of the difficult case of *Williams v Roffey Bros & Nicholls (Contractors) Ltd*⁷ and the circumstances where a promise to pay part of a debt can constitute good consideration.⁸

7. The second part “The Terms of the Contract” deals with matters which are the day-to-day bread and butter of a commercial lawyer. It explains the basis on which terms can be construed as conditions, warranties or intermediate terms and deals with principles of construction, including the somewhat vexed question of the use of extrinsic evidence as an aid to construction, the implication of terms and exemption clauses.
8. The third part deals with “Third Parties”, their rights and obligations, including, of course, the doctrine of privity. The book then deals with vitiating factors, discharge and remedies. What is notable in this part is that it brings into sharp focus the interrelationship between contract law and equity and the author’s expertise in both these areas of the law. That also appears in his discussion of remedies, particularly rescission, injunction and rectification.
9. A broad overall summary of this nature does absolutely no justice to the depth of scholarship of the work. Every proposition of law is set out with precision and clarity with, to say the least, copious references to authority. The book is written with the object of stating the law in Australia. The author emphasises continually that contract law in this country is governed by decisions of the High Court and statute, not the views of judges in courts of other countries, including those of the House

⁷ [1991] 1 QB 1; see Heydon (n 1) 159 [5.430] ff.

⁸ Heydon (n 1) 178 [5.820] ff.

of Lords and the Supreme Court of the United Kingdom,⁹ particularly some of the judgments of the author's former tutor Lord Hoffmann. A good example of the book's adherence to precedent is shown by the treatment of the decision of the High Court in *Walton Stores (Interstate) Ltd v Maher*.¹⁰ Although the author expresses the view that the decision is contrary to principle, he emphasises that it is binding on all courts in Australia.¹¹

10. The text is eminently readable. An indication of the author's style can be shown by his comments on the enforceability of contracts and negotiate in good faith. After referring to a decision of the New South Wales Court of Appeal, which he referred to as the "high watermark" of authority that an agreement to negotiate in good faith can constitute a binding contract, he makes the following remark:

The view that a promise to negotiate in good faith is not enforceable has more support in the authorities than the view that it is. But in light of the passion of asseverations of those who consider that it is, it is difficult to predict how, if at all, the law will develop.¹²

11. I think everyone who was awaiting publication of this work was looking forward to the manner the author dealt with contractual construction. It is obvious that the book had to weigh into the controversy as to what use can be made of surrounding circumstances in the construction of contracts. However, that area, while the focus of some attention, comprised a very small part of the discussion on contractual construction. While emphasising that the controversy surrounding Sir Anthony Mason's "true rule" of statutory construction referred to in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*¹³ is important,

⁹ Ibid vi–vii.

¹⁰ (1988) 164 CLR 387.

¹¹ Heydon (n 1) 178 [5.810].

¹² Ibid 101 [3.200].

¹³ (1982) 149 CLR 337.

the author emphasised in a delightful passage its importance should not be exaggerated:

Dr Henry Kissinger said that academic controversy was so heated because the stakes were so low. There is no doubt that the controversy which exists in connection with the use of extrinsic evidence to establish surrounding circumstances in aid of contractual construction has become heated. There is also no doubt that crucial questions of judicial technique underlie it. And in some circumstances the controversy has considerable practical significance. For various reasons, however, the importance of the controversy is less than might be suggested by the volume and temperature of recent writings. But, in the words of W Jethro Brown: 'What storm so violent as the storm within the teacup – to those have the misfortune to be within.' In what respects, then, is the controversy to be examined a relatively narrow one?¹⁴

12. For the non-constitutional lawyer/historian, W Jethro Brown was Professor at Law and Modern History at the University of Tasmania from 1893 to 1927. He was 25 when he was appointed to that position, outdoing even the author's rapid rise in academia in his younger years.

13. The limited nature of the controversy is amply demonstrated by the author's treatment of all the other issues surrounding the construction of contracts. He deals extensively with the question of what is encompassed in the phrase "ascertaining the objective common intention of the parties", problems arising from standard form contracts and considers particular contractual provisions including exemption and limitation clauses. He also focuses on the use that can be made of post-contractual conduct as an aid to contractual interpretation. In addition, and importantly, there is a chapter on implied terms, clearly explaining when a term in a contract will be implied as a matter of fact, law or by custom. It would be doing the book a serious injustice to state that it focuses merely upon matters which are the subject of current controversy.

14. Further, the author emphasises that the debate is not concerned with the use of context in contractual interpretation.¹⁵ He emphasises that the "true rule" does not require a provision of a contract to be construed only by reference to its grammatical meaning. It does not require the text of

¹⁴ Heydon (n 1) 349 [9.520].

¹⁵ Ibid 369–70 [9.840].

a contract to be construed divorced from its context. It simply requires that context to be discerned, in the first instance, from the terms of the contract itself before resorting to other material. In some ways, it is surprising that such an approach should be regarded as at all revolutionary, or to have been mired in controversy for so long. It reflects common sense. If you want to understand the rights of the parties, read the document which was intended to govern their relationship and get what you can from that. If you are still unsure, then this indicates that you might need to look at other material. I venture to suggest this how lawyers throughout the country have construed contracts on a day-to-day basis.

15. It is not for me to say who is right or who is wrong in this debate. Probably, as the author points out, it is a matter for the High Court to decide that issue and they have not done so yet. I doubt, however, whether the Court will express its conclusions in the forthright manner in which the author has dealt with the critics of the “true rule”:

Foch, who had extensive experience of the splendours and miseries flowing from having command of several national armies in coalition, maintained that the military genius of Napoleon I had been exaggerated, because his greatest victories had been won against coalitions. The enemies of Mason J’s “true rule” are also largely organised in coalitions. Like the anti-Napoleonic coalitions, each coalition is, if not what the late Mr E G Whitlam would have called “old and reactionary”, prone to both internal disunity and conflict with other coalitions. The disunity and conflict tend to cast doubt on each of the criticisms launched against the “true rule”.¹⁶

16. I have gone into some detail about how the author has dealt with this issue because I think it well illustrates the approach taken in the book as a whole. As the author makes clear in the preface, his aim was to “expound the law, so far as the condition of the materials permits, deliberately and often dogmatically, in a lucid, direct and orderly way”.¹⁷ It is perhaps odd to need to emphasise this about a legal textbook, but this is a virtue. It is rare that the author indulges himself by expressing an opinion based on anything other than rigorous legal analysis. On

¹⁶ Heydon (n 1) 366 [9.790].

¹⁷ Ibid v.

some occasions, where the text reaches the conclusion that the law is simply uncertain or unclear, no firm resolution is offered. On others, where unwarranted doubts, or what the author regards as error, particularly when it involves what he considers to be a departure from precedent have crept in, the text is meticulous in demonstrating why they do not have a basis in authority. In dealing with these matters the author does not pull any punches. However, he fairly outlines arguments to the contrary to the position which he has taken before indicating in firm language why he considers them to be incorrect.

17. To dwell on this further would do an injustice both to the book and to its author. There is for example an important chapter on misrepresentation. Although, as the author states, the general law has not been ousted by the Australian consumer law, and operates outside trade and commerce as well as within it,¹⁸ his analysis of representations, including representations as to future reliance and remedies, prove invaluable not only to those who are seeking relief on the basis of common law remedies, but also to those who are alternatively, or additionally, relying on the statutory remedies for misrepresentation.

18. There are two areas in later chapters of the book where the author highlights matters in which the courts have struggled to reach coherent or at least satisfactory solutions. The first is economic duress, particularly in circumstances where a contracting party is forced to vary a contract by threat of breach or non-performance by the other contracting party.¹⁹ The author bluntly states the existing law in this area is “obscure” and “indecisive”.²⁰ He suggests two alternative solutions, first to deny relief in all cases, and second, grant relief in all cases. He points out the difficulties associated with each alternative,

¹⁸ Ibid 547 [14.10].

¹⁹ Ibid 617 [16.220].

²⁰ Ibid 631 [16.440].

and despairingly, but perhaps accurately, states that the best solution is for a person to be careful of whom they choose as a contracting party.²¹

19. The second area is his consideration of whether the expression “just” or “unjust” in section 7 of the *Contracts Review Act 1980* (NSW) should reflect “contemporary community standards”,²² whatever they be at the relevant time. He deals in that context with the concept of asset lending, or responsible lending, which has occupied courts, commissions and regulators to some extent in recent years. He points out that a consequence of a “vigorous campaign” to stop the practice may well lead to the practice being stopped, and that may not suit many borrowers.²³ It is something regulators should keep carefully in mind when they seek to craft so-called “responsible lending standards”.

20. There are many more things to say about this marvellous book, but I think I should leave the President to say some of them. I should also say that it is a pleasure to lead him again after some 9 or 10 years.

21. May I finally express my thanks to the author and to the publisher for producing and publishing this work. I can assure anyone who reads it that they will probably remember things about contract that they have forgotten, certainly learn things they did not know, and save themselves countless hours of research on problems relating to contract law. Both the intellectual and economic benefits of this work are enormous. It has been a pleasure to participate in the launch.

²¹ Ibid 632 [16.470].

²² Ibid 686 [18.810].

²³ Ibid 687 [18.810].