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Contemporary problems in the law of contract

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Introduction

On 18 and 19 December 2015 UNSW Law will host a conference entitled *Contracts in Commercial Law*. Full details regarding the conference are available at the conference website http://www.contracts.law.unsw.edu.au/ and can be obtained by sending an email to: contracts@unsw.edu.au. The conference, which is sponsored by Allens and Linklaters, will consider timeless and emerging problems in the law of contract. It will bring together judges, academics, and practitioners who are leading experts on contract law in order to explain and debate these problems. As we discuss below, the speakers include some of the most distinguished legal thinkers from Australia, Canada, United Kingdom, New Zealand and Singapore.

The fact that the conference will see judges, academics and practitioners working together in the quest to resolve today's most pressing problems in the law of contract merits emphasis. The days that saw a sharp separation between, in particular, the work of judges and academics, have largely faded from memory. Whereas in the past judges would, for example, rarely cite academic works, many judicial officers in the present day are acutely interested in and depend heavily upon insights from academia. It is commonplace for litigants to put before judges academic materials in support of their arguments and, in turn, for judges to make extensive recourse to these materials in writing their opinions. Consistently with the modern approach, the conference avoids historical divisions between the judiciary, the academy and the practising profession.

Another notable aspect of the conference is its international dimension. The fact that many of the speakers are drawn from overseas lays bare our view as convenors that the search for answers to the most persistent problems in the law of contract should not be confined by national borders. Why should lawyers avoid thinking about the law parochially? One short and relatively uncontroversial answer to this question is that valuable insights may be obtained from the way in which the law in other jurisdictions has been developed. Developments in other jurisdictions may constitute models for reform. They may also constitute retrograde steps and hence serve only as warnings of the danger of setting the law down a given path. A second reason, more contentious, why lawyers may want to refer to the law in other jurisdictions might be found in the nature of the common law itself. One view, which is no longer prominent, is that there is and should only be a single common law throughout the world. This perspective is epitomised by Lord Hailsham's remark in *Broome v Cassell & Co Ltd (No 1)* that he viewed 'with dismay the doctrine that the common law should differ in different parts of the Commonwealth'.[1] A diversity of approaches between common law jurisdictions was, in Lord Hailsham LC's eyes, a betrayal of the common law. Another reason that the conference examines contract law from the perspective of multiple jurisdictions is because businesspeople conducting commerce across borders often desire minimal inter-jurisdictional differences in the law. This is because convergence in the law, all other things remaining equal, makes the outcomes of disputes with an international element more predictable. Convergence also reduces what might be arbitrary differences occasioned by whether effect is given to a particular choice of jurisdiction clause or choice of law clause or even, in some jurisdictions, the law of the forum whose courts are first seized with the dispute. This is an additional reason, in considering what the law of a given jurisdiction should be, to look at the law elsewhere.[2]

The presenters

Contracts in Commercial Law features an extraordinary list of presenters. They are among the most distinguished contract law thinkers in the world. Plenary papers will be delivered by Chief Justice James Allsop AO (Federal Court of Australia), Chief Justice Thomas Bathurst AC (Supreme Court of New South Wales),

Dr Andrew Bell SC (11 Wentworth Chambers), Professor Andrew Burrows FBA QC (University of Oxford), Professor Hugh Collins FBA (University of Oxford), Professor Mindy Chen-Wishart (University of Oxford), Professor Joshua Getzler (University of Oxford), Lord Hope of Craighead KT (House of Lords), Justice Susan Kiefel AC (High Court of Australia), Professor Ben McFarlane (University College London), Professor David McLauchlin (Victoria University of Wellington), Professor Elisabeth Peden (University of Sydney), Professor David Percy QC (University of Alberta), Justice Andrew Phang (Supreme Court of Singapore), Professor Andrew Robertson (University of Melbourne), Professor Robert Stevens (University of Oxford) and Professor Andrew Tettenborn (Swansea University). Poster presentations, which afford the opportunity to debate the arguments addressed by the presenter on a one-to-one basis, will be delivered by Dr Carmine Conte (University of Cambridge), Mr Andrew Dyson (London School of Economics), Dr Jodi Gardner (University of Oxford), Associate Professor Tham Chee Ho (National University of Singapore), Mr Nicholas Tiverios (University College London), Dr Frederick Wilmot-Smith (University of Oxford) and Dr David Winterton (UNSW Australia). The discussion that follows in this article gives a foretaste of the problems that these presenters will discuss. It identifies positions that they may take in the relevant debates and provides the background to the relevant flashpoints and challenges.

Some issues that will be encountered at *Contracts in Commercial Law*

(i) Consideration

In Australia, and particularly since *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*[3] was decided two decades ago, question marks have hovered over the doctrine of consideration. Long ago Lord Mansfield had deprecated the concept.[4] Consideration is unnecessary if the contract is in the form of a deed. Consideration is pushed to one side in common commercial contracts such as letters of credit. And the developments in relation to estoppel since Lord Denning's stunning extempore decision in *Central London Property Trust Ltd v High Trees House Ltd*[5] have led many scholars to question the purpose of a doctrine that can be evaded so easily. In England and Canada, questions surrounding consideration are further complicated by its emasculation by (in the case of England) the Contracts (Rights of Third Parties) Act 1999 and (in the case of Canada) the Supreme Court's decisions in cases such as *London Drugs v Kuehne & Nagel International Ltd*[6] and *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*.[7]

At the conference, these issues will be addressed by Justice Kiefel of the High Court of Australia, whose depth of knowledge of comparative law spans both common law and civilian jurisdictions.[8] Common law and civil law jurisdictions diverge, of course, in relation to consideration. The doctrine of consideration will also be addressed by Professor Chen-Wishart from the University of Oxford whose work on consideration is among the leading expositions on the subject,[9] and by Professor McFarlane from University College London who has just published the magisterial *The Law of Proprietary Estoppel*.[10] Professor McFarlane also edits the chapter on estoppel in the most recent edition of *Snell's Equity*.[11]

(ii) Interpretation and rectification

In 2011 Chief Justice Bathurst (who will speak at the conference) suggested that there was once a time when a book on contract interpretation would have appeared on a list of 'the shortest books ever written' alongside books such as *Successful Royal Marriages* and *Career Opportunities for Philosophy Students*.[12] That is no longer the case.[13] The principles of contract interpretation are complex and books on the subject sometimes run to over a thousand pages. Australia is the ideal place to for them to be discussed. This is partly because, in Australia, there has recently been heated controversy about a basic question in this area: the extent to which recourse can be had to evidence of surrounding circumstances. The debate in this regard was agitated by the expression of the view that a contract must suffer from ambiguity or language that is susceptible of more than one meaning before recourse could be had to evidence of surrounding circumstances. This view was promoted by three justices of the High Court of Australia in the course of refusing an application for special leave to appeal.[14] It was followed in the Court of Appeal in Western Australia.[15] The hurdle was said by the special leave panel to be based on a judgment of Mason J, with which Stephen and Wilson JJ had concurred.[16] Extrajudically, Mason J subsequently denied that he had intended to introduce any such obstacle.[17] The same broader view of admissibility had been taken by intermediate appellate courts including the New South Wales Court of Appeal,[18] the Victorian Court of Appeal[19] and the Full Federal

Court.[20] The reasons of Mason J were closely scrutinised in those decisions.[21] The obstacle now may have been removed by the unanimous decision of the High Court of Australia in *Electricity Generation Corporation t/as Verve Energy v Woodside*.[22] Powerful subsequent judgments of the New South Wales Court of Appeal[23] and the Full Federal Court,[24] which were rapidly followed,[25] have construed *Woodside* as having dispensed with this obstacle. Western Australia has taken a different path and has preferred the restrictive approach which requires ambiguity.[26]

Closely associated with issues of interpretation are questions of rectification. The broader the operation of interpretation principles, the less scope there is for principles of rectification. In other words, the more red ink that can be spilled in the interpretation of an agreement, the less will be the need to resort to the technique of rectifying it. It has even been suggested by Professor Burrows[27] that there may be no role left for rectification in England following Lord Hoffmann's leading decision in *Investors Compensation Scheme v West Bromwich Building Society*.[28] But this was not the approach taken by Lord Hoffmann, who later provided some scope for the rules of rectification in one of his final decisions in the House of Lords.[29]

At the conference, the topics of interpretation and rectification will be addressed by leading authorities on the subject: Chief Justice Bathurst of the Supreme Court of New South Wales, Professor McLauchlan from Victoria University of Wellington[30] and Professor Stevens from the University of Oxford.[31]

(iii) Good faith

A notable aspect of the law of contract in respect of which the courts in different jurisdictions, and sometimes within the same jurisdiction, have taken what appears to be, at least initially, radically different approaches concerning good faith. A doctrine of good faith has been accepted, and explained, in the context of an express term by several Australian courts, including by the New South Wales Court of Appeal in the leading decision in *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service*.[32] In that case, the Court of Appeal held that the obligation of good faith encompasses at least the three notions: namely, (i) an obligation on the parties to cooperate in achieving the contractual objects; (ii) compliance with honest standards of conduct; and (iii) compliance with standards of conduct that are reasonable having regard to the interests of the parties. In contrast, in the Western Australian Court of Appeal in *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd*,[33] Pullin JA (with whom Newnes JA agreed) said that the natural and ordinary meaning of good faith required only that parties deal with each other honestly. In Canada, and following the practice of most jurisdictions in the United States, the Supreme Court recently, and unanimously, endorsed a general implication of a duty of good faith requiring 'that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily'.[34] This might appear to contrast with the Australian decision in *Androvitsaneas v Members First Broker Network*[35] in which the Victorian Court of Appeal said that they did 'not accept that an obligation of good faith should be implied indiscriminately into all commercial contracts'. It might also contrast with the decision of the House of Lords in *Walford v Miles*.[36] In that case the House held that a 'lock in' agreement, which required the parties to negotiate with each other in good faith, was so uncertain that it was unenforceable.

In this area of contract law, as in many others, much may depend upon terminology. On one view, the phrase 'good faith' might not describe a single positive duty at all but, instead, an overarching norm with various manifestations of particular duties. That view is apparent in the decision of the New South Wales Court of Appeal in *Macquarie International Health Clinic*, to which reference has been made in the previous paragraph. On this way of understanding the concept of good faith, a duty of good faith could not sensibly be implied indiscriminately into commercial contracts. Another view is that a duty of good faith requires powers that affect another contracting party to be exercised in a manner that is both honest and reasonable in all the circumstances. Such implications concerning both honesty and reasonableness in the exercise of powers permeate many areas of law in addition to contract law, including property law, administrative law, the law of trusts, and insolvency law. Such an approach already exists in various areas of contract discretion including the well-recognised example of the obligation to cooperate to achieve contractual objectives. As Mason J explained in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*:

> where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is nec-

> essary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances.[37]

Once again, three of the world's leading thinkers in this area will present papers on the subject. Professor Peden from the University of Sydney may consider this issue in the course of her discussion concerning penalties.[38] Chief Justice Allsop from the Federal Court, who was the author of the decision in *Macquarie International Health Clinic*, will deal with this and other themes. Professor Percy QC from the University of Alberta will examine the topic with a Canadian focus.

(iv) Illegality

One of the most difficult problems in the law of contract and, indeed, private law generally, concerns the doctrine of illegality.[39] The uncertainty that infects the doctrine in England is particularly pronounced.[40] A diversity of approaches has been developed, none of which commands general acceptance. Tests for determining the effect of a plaintiff's illegal conduct include a causal test,[41] an 'inextricable link' test,[42] a test that asks whether the plaintiff needs to rely on his or her illegality[43] and an analysis that weighs the competing policy considerations.[44] The lack of clarity in the law that this state of affairs has induced is such that it prompted Lord Neuberger, the President of the United Kingdom Supreme Court, recently to make the unusual remark that 'the proper approach to the defence of illegality needs to be addressed by this court (certainly with a panel of seven and conceivably with a panel of nine justices) as soon as appropriately possible'.[45] In *Hounga v Allen* Lord Hughes (with whom Lord Carnwath agreed) wrote that 'a generalised statement of the conceptual basis for the doctrine under which illegality may bar a civil claim has always proved elusive'.[46] Two other members of the Supreme Court, Lord Mance[47] and Lord Sumption,[48] have in extrajudicial writings recently called for the English Law Commission to re-examine the defence.

In contrast with England, a détente appears to have been reached in Australia. A uniform approach to illegality across the law of trusts,[49] and the law of torts[50] as well as the law of contract[51] has been developed. The essential rule is that the application of the defence of illegality depends upon the 'policy of the statute' that the plaintiff violated. The defence will apply if an intention to render private law rights of the plaintiff ineffective can be discerned. As Deane and Gummow JJ put it in *Nelson v Nelson*, which is the decision that pioneered this approach, 'if the illegality consists in the violation of a statute, courts will give or refuse relief depending upon the fundamental purpose of the statute'.[52] The High Court's understanding of the defence of illegality has been supported by some writers[53] and criticised by others. Stewart and Carter, for example, complain that the High Court's approach 'has undoubtedly blurred the distinction between the concept of statutory prohibition and the potential impact of public policy on causes of action'[54] and that 'the Court has left important questions unanswered'.[55] At the conference Professor Burrows will address the evolution of the High Court of Australia's jurisprudence in relation to the illegality defence and any lessons that can be drawn therefrom for England.

(v) The penalties doctrine

Several speakers and poster presenters at the conference will address the penalties doctrine. In doing so, those presenters -- Dr Conte, Professor Peden and Mr Tiverios -- will focus on an issue which is one of the most topical questions in Australia and England. Professor Peden has written prolifically on this subject[56] which also forms part of the doctoral research of Dr Conte[57] and Mr Tiverios. There is also an intersection between the rule against penalties and the operation of exclusion clauses which will be addressed at the conference by Dr Bell SC of the New South Wales bar.

The United Kingdom Supreme Court has also just heard the appeal from the decision of the Court of Appeal in *Makdessi v Cavendish Square Holdings BV*.[58] One question on which the Supreme Court may rule is whether there is any place for the penalties doctrine in the modern law of contract. Impetus for the Supreme Court to do so may be supplied by, for example, Christopher Clarke LJ's remark in the Court of Appeal that the rule against penalties is a 'blatant interference with freedom of contract'[59] and Diplock LJ's comment in another leading penalties case that he had made 'no attempt, where so many others have failed, to rationalise this common law rule'.[60] Whereas the scope of the penalties doctrine may be limited by the United Kingdom Supreme Court, the law of penalties in Australia has been expanded beyond its existing English limits to apply even in cases where no breach of contract has occurred.[61] That approach is not simple to apply. In a

recent decision of the Full Federal Court,[62] which is currently the subject of an application for special leave to appeal, the Full Court reached a different view as to its application from the trial judge.[63] The difference might, in part, be explained simply by different approaches to the normative foundation of the principle. Experience over centuries with the Roman doctrine of *laesio enormis* suggests that such differences are difficult to resolve.

(vi) Remedies

Another topic which will be explored in detail at the conference will be that of remedies. One might have expected that fundamental rules of remedies would have been settled long ago given that more than a century and a half has passed since *Robinson v Harman* was decided,[64] in which Robinson B famously articulated the measure of compensatory damages in an action in contract. But there remains significant controversy about even the most basic principles of remedies in contract law. A recent decision of the United Kingdom Supreme Court in proceedings that had been brought as a case involving both breach of contract and breach of trust raises the most fundamental of questions concerning the difference between debt and damages.[65] This question will be addressed by Professor Tettenborn of Swansea University, the author of the authoritative *The Law of Damages.*[66]

A primary remedy in the contract law setting is that of specific performance. In a decision of the House of Lords, which has been relied upon many times in Australia, Lord Hoffmann considered some of the most basic principles concerning the award of specific relief following a threatened breach of contract.[67] Lord Hoffmann observed that the principles in common law and civilian systems might not be so different from each other despite the civilian position in countries like France or Germany that a plaintiff is prima facie entitled to specific performance. Delivering the decision of the House of Lords, Lord Hoffmann refused to order specific performance to require a business to continue to be run. However, very shortly after that decision was delivered, the Outer House of the Scottish Court of Session took a civilian approach to a case involving similar facts and reached the opposite conclusion.[68] Why this should be so, and the circumstances in which specific performance should be granted, will be among the questions addressed at the conference by Lord Hope of Craighead.

Conclusion

The topics discussed above are a small vignette of the delights to be sampled at *Contracts in Commercial Law*. Many more topics of fundamental importance will be explored. They will be addressed by speakers such as Professor Robertson of the University of Melbourne, whose concern will be with remoteness of damage. If we may say so, he is particularly well positioned to speak to that subject given that his work was one of the influences in the revolutionary decision of the House of Lords in *The Achilleas*.[69] The topics will also include broader themes underlying contract law by Professor Collins, Vinerian Professor of English Law at the University of Oxford,[70] Chief Justices Allsop and Bathurst, respectively of the Federal Court and New South Wales Supreme Court, and Justice Phang, a Judge of Appeal of the Supreme Court of Singapore.

In 2012 the Federal Attorney General introduced a project to consider the codification of Australian contract law.[71] Impassioned pleas of *festina lente* were made by Australian scholars.[72] English scholars, too, including some speaking at this conference have expressed similar remarks in response to suggestions that English contract law should be codified[73] although others, again including speakers at the conference, have taken a diametrically opposed position on this point.[74] One foundation for the codification project is the desire to move towards a uniform, transboundary law of contract. That is a laudable goal, whether or not it is achieved by codification. But that goal requires consideration, and understanding, of the fundamental principles concerning the law of contract and the way those principles dictate the approach to be taken to contemporary issues in the law of contract. That is the raison d'etre of the *Contracts in Commercial Law* conference on 18 and 19 December 2015.

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1 [1972] AC 1027 at 1067; [1972] 1 All ER 801; [1972] 2 WLR 645.

2 For development of this suggestion, see J W Harris, 'The Privy Council and the Common Law' (1990) 106 *Law Quarterly Review* 574 at 597-8.

3 (1988) 165 CLR 107; 80 ALR 574; [1988] HCA 44; BC8802625.

4 *Pillans & Rose v Van Mierop & Hopkins* (1765) 3 Burr 1663 at 1669; 97 ER 1035 at 1038.

5 [1947] KB 130 (KBD); [1956] 1 All ER 256; [1947] LJR 77; (1946) 62 TLR 557.

6 [1992] 3 SCR 299.

7 [1999] 3 SCR 108.

8 For an illustration, see S Kiefel, 'Comparative Analysis in Judicial Decision-Making: the Australian Experience' (2006) 33 *Pepperdine Law Review* 833.

9 See eg, M Chen-Wishart, 'In Defence of Consideration' (2013) 13 *Oxford U Commw LJ* 209; M Chen-Wishart, 'Consideration and Serious Intention' [2009] *Singapore Journal of Legal Studies* 434; M Chen-Wishart, 'A Bird in the Hand: Consideration and One-Sided Contract Modifications' in *Contract Formation and Parties*, A Burrows and E Peel (Eds), Oxford University Press, Oxford, 2010; M Chen-Wishart, 'Consideration for Variation of Contracts' [2014] *NZLJ* 65.

10 B McFarlane, *The Law of Proprietary Estoppel*, Oxford University Press, Oxford, 2014.

11 J McGhee, *Snell's Equity*, 33rd ed, Sweet & Maxwell, London, 2015, ch 12.

12 T Bathurst, 'Book Launch: The Interpretation of Contracts in Australia', 29 November 2011 <www.supremecourt.justice.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/bathurst 291111.pdf> (accessed 3 August 2015).

13 See, eg, K Lewison, *The Interpretation of Contracts*, 5th ed, Sweet & Maxwell, London, 2013; K Lewison and D Hughes, *The Interpretation of Contracts in Australia*, Thomson Reuters, Sydney, 2011; G McMeel, *The Construction of Contracts*, 2nd ed, Oxford University Press, Oxford, 2011; J Thomson, L Warnick and K Martin, *Commercial Contract Clauses: Principles and Interpretation*, Thomson Reuters, Sydney, 2012; J W Carter, *The Construction of Commercial Contracts*, Hart Publishing, Oxford, 2013.

14 *Western Export Services Inc v Jireh International Pty Ltd* (2011) 282 ALR 604; 86 ALJR 1; [2011] HCA 45; BC201108359.

15 *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* [2013] WASCA 66; BC201302442 at [107].

16 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352; 41 ALR 367; [1982] HCA 24; BC8200083.

17 A Mason, 'Opening Address' (2009) 25 *J Con L* 1 at 3.

18 *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603; [2007] NSWCA 65; BC200702771 at [107]-[109] per Tobias JA (with whom Mason P and Campbell JA agreed); *Synergy Protection Agency Pty Ltd v North Sydney Leagues' Club Ltd* [2009] NSWCA 140; BC200904993 at [22] per Allsop P (with whom Tobias and Basten JJA agreed); *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* (2009) 261 ALR 382; [2009] NSWCA 234; BC200907137 at [1]-[3] per Allsop P (with whom Basten JA agreed) and [113] per Campbell JA.

19 *MBF Investments Pty Ltd v Nolan* (2011) 37 VR 116; [2011] VSCA 114; BC201102273 at [198]-[203] (the court).

20 *Lion Nathan Australia Pty Ltd v Cooper Brewery Ltd* (2006) 156 FCR 1; 236 ALR 561; [2006] FCAFC 144; BC200608232 at [45]-[52] per Weinberg J, at [100] per Kenny J and at [238] per Lander J.

21 *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603; 264 ALR 15; [2009] NSWCA 407; BC200911627 at [17] per Allsop P.

22 (2014) 251 CLR 640; 306 ALR 25; [2014] HCA 7; BC201401090.

23 *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 310 ALR 113; [2014] NSWCA 184; BC201404487.

24 *Stratton Finance Pty Ltd v Webb* (2014) 314 ALR 166; [2014] FCAFC 110; BC201407172.

25 *Wambo Coal Pty Ltd v Sumiseki Materials Co Ltd* (2014) 290 FLR 18; 101 ACSR 643; [2014] NSWCA 326; BC201407715; *Newey v Westpac Banking Corp* [2014] NSWCA 319; BC201407530; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2014] NSWCA 323; BC201407663; *CPSU, the Community and Public Sector Union v Victoria (Department of Justice)* [2014] FWCFB 6153. Compare *Technomin Australia Pty Ltd v XStrata Nickel Australasia Operations Pty Ltd* [2014] WASCA 164; BC201407851.

26 *Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd* [2014] WASCA 164 (S); BC201407851.

27 A Burrows, 'Construction and Rectification' in *Contract Terms*, A Burrows and E Peel (Eds), Oxford University Press, Oxford, 2007.

28 [1998] 1 WLR 896 (HL); [1997] CLC 1243; [1998] 1 All ER 98.

29 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101; [2009] All ER (D) 12 (Jul); [2010] 1 All ER (Comm) 365; [2009] UKHL 38.

30 See D McLauchlan 'Refining Rectification' (2014) 130 *Law Quarterly Review* 83.

31 See R Stevens 'Objectivity, Mistake and the Parol Evidence Rule' in *Contract Terms*, A Burrows and E Peel (Eds), Oxford University Press, Oxford, 2007, ch 6.

32 (2010) 15 BPR 28,563; [2010] NSWCA 268; BC201008314.

33 (2010) 41 WAR 318; [2010] WASCA 222; BC201008728 at [61].

34 *Bhasin v Hrynew* [2014] SCC 71; [2014] 3 SCR 4954 at [63].

35 [2013] VSCA 212; BC201311913 at [108].

36 [1992] 2 AC 128 (HL); [1992] ANZ ConvR 207; [1992] 1 All ER 453; [1992] 2 WLR 174.

37 (1979) 144 CLR 596 at 607; (1979) 53 ALJR 745; BC7900096. Relying upon *Mackay v Dick* (1881) 6 App Cas 251 at 263; 18 SLR 387; 8 R 37; 29 WR 541 (HL). See also *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 448-9; 131 ALR 422; 69 ALJR 797; BC9506439 per McHugh and Gummow JJ; *Commonwealth Bank of Australia v Barker* (2014) 312 ALR 356; 88 ALJR 814; [2014] HCA 32; BC201407419 at [25].

38 E Peden, *Good Faith in the Performance of Contracts*, LexisNexis, Butterworths, Sydney, 2003.

39 The doctrine has been described as posing an 'intractable' problem, J Swanton, 'Plaintiff a Wrongdoer: Joint Complicity in an Illegal Enterprise as a Defence to Negligence' (1981) 9 *Syd L R* 304 at 33; a 'vexed issue' (*Winter v Commonwealth of Australia* (1992) 112 ACTR 10 at 22); and a 'conundrum' (C Debattista, 'Ex Turpi Causa Returns to the English Law of Torts: Taking Advantage of a Wrong Way Out' (1984) 13 *Anglo-American Law Review* 15 at 27).

40 For a contemporaneous conspectus of the law in this regard, see J Goudkamp, 'A Long, Hard Look at *Gray v Thames Trains Ltd*' in *The Jurisprudence of Lord Hoffmann*, P Davies and J Pila (Eds), Hart Publishing, Oxford, 2015, ch 4.

41 *Gray v Thames Trains Ltd* [2009] 1 AC 1339; [2009] 4 All ER 81; [2009] 3 WLR 167; [2009] UKHL 33.

42 *Cross v Kirkby* Unreported, EWCA, 18 February 2000.

43 *Tinsley v Milligan* [1994] 1 AC 340 (HL); [1995] ANZ ConvR 420; [1993] 3 All ER 65; [1993] 3 WLR 126.

44 *Hounga v Allen* [2014] UKSC 47; [2014] ICR 847.

45 *Bilta (UK) Ltd (in liq) v Nazir (No 2)* [2015] All ER (D) 149 (Apr); [2015] 2 WLR 1168; [2015] 2 All ER 1083; [2015] UKSC 23 at [15].

46 [2014] UKSC 47; [2014] ICR 847 at [54].

47 J Mance, 'Ex Turpi Causa -- When Latin Avoids Liability' (2014) 18 *Edin LR* 175 at 192.

48 J Sumption, 'Reflections on the Law of Illegality' (2012) 20 *Restitution Law Review* 1 at 8-12.

49 *Nelson v Nelson* (1995) 184 CLR 538; 132 ALR 133; [1995] HCA 25; BC9501517.

50 *Miller v Miller* (2011) 242 CLR 446; 275 ALR 611; [2011] HCA 9; BC201101793. For discussion, see J Goudkamp, 'The Defence of Joint Illegal Enterprise' (2010) 34 *Melb Univ L Rev* 425.

51 See *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 at 229-30; 143 ALR 569; [1997] HCA 17; BC9701743.

52 (1995) 184 CLR 538 at 559; 132 ALR 133; BC9501517.

53 B Kremer, 'An "Unruly Horse" in a "Shadowy World"?: The Law of Illegality after *Nelson v Nelson'* (1997) 19 *Syd L R* 240, praising the High Court's decision in *Nelson v Nelson*.

54 A Stewart and J W Carter, 'The High Court and Contract Law in the New Millennium' (2003) 6 *FJLR* 185 at 207.

55 Ibid, at 208.

56 J W Carter, W Courtney, E Peden, A Stewart, and G Tolhurst, 'Contractual Penalties: Resurrecting the Equitable Jurisdiction' (2013) 30 *J Con L* 99; E Peden, 'Penalty Clauses and What Would the High Court Have Made of Interstar Wholesale Finance Pty Ltd v Integral Home Loans?' (2009) 23 *CLA* 6.

57 Dr Conte's published writings on the subject include C Conte, 'The Jurisdiction to Relieve Against Penalties and Forfeitures: Time for a Rethink' (2010) 126 *Law Quarterly Review* 529.

58 [2013] All ER (D) 290 (Nov); [2014] 2 All ER (Comm) 125; [2013] EWCA Civ 1539.

59 Ibid at [44].

60 *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128; [1966] 1 WLR 1428 (CA) at 1446.

61 *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205; 290 ALR 595; [2012] HCA 30; BC201206622.

62 *Australia and New Zealand Banking Group Ltd v Paciocco* [2015] FCAFC 78; BC201504784.

63 *Paciocco v Australia and New Zealand Banking Group Ltd* (2014) 309 ALR 249; [2014] FCA 35; BC201400298.

64 (1848) 1 Ex Rep 850; 154 ER 363.

65 *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] All ER (D) 49 (Nov); [2014] 3 WLR 1367; [2014] UKSC 58.

66 A Tettenborn, *The Law of Damages*, Butterworths, London, 2010.

67 *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL); [1998] ANZ ConvR 470; [1997] 3 All ER 297; [1997] 2 WLR 898.

68 *Cooperative Insurance Society Ltd v Halfords Ltd (No 2)* 1999 SLT 685.

69 *Transfield Shipping Inc v Mercator Shipping Inc* [2009] 1 AC 61; [2008] 4 All ER 159; [2008] 3 WLR 345; [2008] UKHL 48, see especially at [11], where Lord Hoffmann described A Robertson's 'The Basis of the Remoteness Rule in Contract' (2008) 28 *Leg S* 172 as 'particularly illuminating'.

70 Professor Collins' writings in this regard are voluminous. They include H Collins, *The Law of Contract*, 4th ed, Butterworths, London, 2003 and H Collins, *Regulating Contracts*, Oxford University Press, Oxford, 1999.

71 Commonwealth Attorney-General's Department, *Improving Australia's Law and Justice Framework: A Discussion Paper Exploring the Scope for Reforming Australian Contract Law*, 2012.

72 See, eg, W Swain, 'Contract Codification in Australia: Is it Necessary, Desirable and Possible?' (2014) 36 *Syd LR* 131; cf L Nottage, 'The Government's Proposed Review of Australia's Contract Law: An Interim Positive Response' in *Codifying Contract Law: International and Consumer Law Perspectives*, M Keyes and T Wilson (Eds), Ashgate, Surrey, 2014, ch 7.

73 A Burrows, 'Legislative Reform of Remedies for Breach of Contract: The English Perspective' (1997) 1 *Edin L R* 155 at 156.

74 H Collins, *The European Civil Code: The Way Forward*, Cambridge University Press, Cambridge, 2008.