REVIEWS

BREACH OF CONTRACT

by J.W. Carter, Sydney, Law Book Company, 1991; 2nd edn; 490 pp. plus appendix; hardback, $125.

Since the first edition of this text was published in 1984 there have been considerable developments in the law of contracts. The decisions of the High Court in *Pavey & Mathews Pty Ltd v Paul* (1987) 162 CLR 221, *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, *Trident General Insurance Co. Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, *Foran v Wight* (1989) 168 CLR 385 and *Commonwealth v Verwayen* (1990) 170 CLR 394 show a further erosion of a will-based theory of contract and a corresponding acceptance of a law of contract based on substantive justice. This trend mirrors the growing paternalism shown by the legislature in enacting statutes designed to reduce inequality of bargaining power between merchant and consumer, such as the *Trade Practices Act* 1974 (Cth), the *Contracts Review Act* 1980 (NSW) and the *Fair Trading Act* 1991 (Tas.). However, commentators have met the developments in the High Court with some apprehension. For instance, in an article written in 1988,[1] Mr Justice Priestly described contract law as a 'burgeoning maelstrom'. This strange metaphor is indicative of the change and uncertainty that characterises contemporary Australian contract law. The so-called 'classical contract' law of the 19th century may have promoted individual responsibility and self-reliance at the expense of fairness, but it was governed by recognised and certain rules of common law. What then, is the future of contract law in Australia? Should it be governed by certainty, rather than equitable notions of justice?

With the considerable developments since 1984, a second edition of *Breach of Contracts* is timely. This book seeks to state concisely the law of breach of contract as at June 1991 in England and Australia. The focus and the format remain the same as the first edition. The author's emphasis is on 'the principles relevant to the right of one party to terminate the performance of a contract for breach or repudiation by the other'. He analyses the Anglo-Australian law, but he refers to the law of the United States and that of New Zealand for comparison.

As in the first edition, the book is divided into five parts. These are: establishing a breach of contract and the right to terminate performance; types of contractual terms and the consequences of their breach; repudiation and anticipatory breach; election; and the consequences of termination.

This edition has two important changes. First, Chapter 10 (Exercise of the Right to Terminate) is restructured to acknowledge the considerable developments in the law of estoppel and relief against forfeiture since 1984. Second, an Appendix containing the 75 statements of principle found throughout the book is added. This provides a valuable reference to points of law. For instance, the statement of estoppel is reduced to the key concepts of unequivocal representation, reliance and consequent injustice:

> Article 59. A party to a contract who would otherwise be in a position to justify an election to terminate the performance of the contract for breach or repudiation by the other party, is estopped from relying on such an election where:
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> (a) the first party has, by words or conduct, unequivocally promised or represented to the other party that the right of election would not be enforced or exercised;
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> (b) that promise or representation has been relied upon by the other party; and
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> (c) it would, by reason of detriment suffered by that party or the circumstances at the time when the first party seeks to elect, be unjust or inequitable to allow the first party to enforce or exercise the right of election or otherwise withdraw or contradict the representation or promise, and a party may be so estopped whether or not there was knowledge of the right to elect or the circumstances which gave rise to the right to elect.

The author's careful and precise style is evident throughout in the meticulous cross-referencing and footnoting and the comprehensive index. The use of sub-headings to introduce each paragraph and the outline of contents at the beginning of each chapter also convey clarity and precision. Complex principles of law are presented clearly and succinctly.

I have two criticisms of the text which are, perhaps, unfair, given the author's intention that the book be a statement of principles. The first is that this is not a readable book. Professor Carter succeeds admirably in stating principles of law, but brevity of text and definitive, self-contained paragraphs are used at the expense of readability. My second criticism is that the author's approach does not allow for comprehensive examination of the history and philosophy behind the principles he states, nor for analysis of the future direction of contract law in Australia. For such analysis we must turn to the author's many published articles.

The text will be of great value to the practitioner and the student of contract with its clear exposition of the law of breach (although the cost of the book will limit student use). However, the question whether Australian contract law should be governed by certainty, rather than equitable notions of justice, remains unanswered. Carter's *Breach of Contract* tells us where the law of breach of contract was as at June 1991. It does not tell us where contract law has been, or more importantly, where it is going.

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References

1. Priestly, L.J., 'Contract — the Burgeoning Maelstrom', (1988) 15 Journal of Contract Law.