Launch of *Heydon on Contract: The General Part*

by

The Hon Justice A S Bell

President, New South Wales Court of Appeal

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Banco Court

The author spent all of his distinguished years at the Bar as a member of the Eighth Floor of Selborne Chambers. It was to Eight Selborne that he returned following his distinguished years of service first as a judge of the New South Wales Court of Appeal, then as a justice of the High Court of Australia, and then as Royal Commissioner. There often sits on the reception desk of Eight Selborne a vase of flowers. The vase never contains violets. Violets can shrink. There is no room for shrinking violets on Eight Selborne, and never has been. This is a theme to which I shall return.

Another characteristic of Eight Selborne is that, when that Floor comes to celebrate a member's achievement, it never meets in a restaurant which serves fusion cuisine. Fusion is not a popular word on Eight Selborne. Resistance to fusion, however, does not mean that an acclaimed master of equity cannot at the same time be a master of the common law, and in truth, one cannot be a good contract lawyer without also having a sound grasp of equitable principle – and there is far more reference to and discussion of equitable doctrine in *Heydon on Contract* than in most contract law texts. There is, for example, a whole chapter on 'Unconscientious Conduct', as well as a detailed treatment of equitable assignment of benefits under contracts.[1]

The author of the book launched tonight deprecates the use of sobriquets such as 'master of equity' or 'master of the common law' but, as TEF Hughes QC must have said on thousands of occasions, the facts in this case are "stubborn and impressive".

[1] See JD Heydon, *Heydon on Contract* (Lawbook Co, 2019), ch 18 and [13.280]ff respectively.

The facts reveal the author's first foray into the common law occurred almost 50 years ago, in 1971, with the publication of the first edition of *The Restraint of Trade Doctrine*. 1973 saw the monograph on *Economic Torts* published. It was republished in a second edition in 1978, shortly before the author came to the Bar. In between editions, in 1975, came a Casebook on Equity, now in its 8th edition. Coinciding with the second edition of *Economic Torts* in 1978 was the first edition, with Bruce Donald, of *Trade Practices Law*, of which there have been many subsequent editions or manifestations, published in the financially crippling loose leaf format! There then followed, in 1979, the commencement of an association with the Australian edition of *Cross on Evidence* which has lasted for 40 years, spanning 10 editions. Later works, of course, include two editions of Meagher Gummow and Lehane (the 4th, in 2002, with R P Meagher and Justice Leeming, and the 5th, in 2015, with Justice Leeming and Dr Turner) and two editions of *Jacobs' Law of Trusts* (the 7th and 8th editions in 2006 and 2016 respectively), both with Justice Leeming. *Restraint of Trade* is now in its fourth edition.[2] Not to be overlooked in this extraordinary record are the 20 years spent editing the Australian Law Reports[3] and 20 years as editor of the New South Wales Law Reports,[4] collectively resulting in the publication of exactly 200 volumes of law reports.

The work which it is my very great pleasure to assist in launching tonight is one of quite extraordinary scholarship and erudition. It displays many of the characteristics that Chief Justice Spigelman highlighted upon the author's elevation to the High Court from the New South Wales Court of Appeal in 2003: "prodigious energy", "inexhaustible relish for work", "vivid prose style", and "systematic arrangement and presentation" in which "[n]o corners were cut" and "[n]o issues were dodged".[5]

The work is ominously entitled *Heydon on Contract: the General Part*. It echoes, in this regard, Professor Glanville Williams' classic 1953 text *Criminal Law: The*

[2] JD Heydon, *The Restraint of Trade Doctrine* (LexisNexis, 4th ed, 2018).

[3] From (1979-80) 29 ALR to (1999-2000) 169 ALR.

[4] From [1980] 1 NSWLR to (1999-2000) 48 NSWLR.

[5] The Hon JJ Spigelman, *Transitions in the Court: Ceremonial Speeches by Chief Justice Spigelman 1998-2011* (NSW Bar Association, 2012) 26-27.

General Part.[6] That work aimed to "search out the general principles of the criminal law, that is to say those principles that apply to more than one crime."[7] Just as Williams distinguished between the general part of the criminal law and specific crimes,[8] so too does Heydon distinguish between the general part – that is, "the basic doctrines of contract formation, third party rights and dealings, contractual invalidity, termination and remedies for or affecting breach of contract" – and "*specific contracts*, like contracts relating to the sale of goods".[9]

Only time will tell whether the present work will have the same influence as Williams' 1953 text but I strongly suspect it will. It most certainly should. It has already been cited in numerous decisions of the New South Wales Court of Appeal.[10] One Federal Court judge has also been wise enough to cite it[11] and, as the author himself might say in one of his more mordant moments, many others are no doubt giving some thought to the prospect of doing so. Now that there has been a further print run, which almost inevitably will also be shortly exhausted, its reach will continue, and rightly so.

In this context it is, I think, apt to recall the words of an early reviewer of Glanville Williams' text who wrote that "the best tributes to this work will be not so much what reviewers say of it but what teachers and practitioners will do with it."[12] There is little doubt that *Heydon on Contract* – which outrageously exhausted its first print run within a matter of weeks, if not days – will soon be on the shelves and trolleys of

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[6] Glanville L Williams, *Criminal Law: The General Part* (Stevens & Sons, 1953). An expanded second edition followed eight years later: *Criminal Law: The General Part* (Stevens & Sons, 2nd ed, 1961).

[7] Williams, *Criminal Law* (1953), v.

[8] Ibid.

[9] Heydon, above n 1, vi (emphasis in original).

[10] *Searle v Commonwealth of Australia* [2019] NSWCA 127; *Wollongong Coal Ltd v Gujarat NRE India Pty Ltd* [2019] NSWCA 135; *Coplin v Al Maha Pty Ltd* [2019] NSWCA 159; *Donau Pty Ltd v ASC AWD Shipbuilder Pty Ltd* [2019] NSWCA 185; *Strike Australia Pty Ltd v Data Base Corporate Pty Ltd* [2019] NSWCA 205; *Darzi Group Pty Ltd v Nolde Pty Ltd* [2019] NSWCA 210.

[11] *ACME Properties Pty Ltd v Perpetual Corporate Trust Ltd as trustee for Braeside Trust* [2019] FCA 1189.

[12] A L Armitage, 'Book Reviews: Criminal Law: The General Part' (1954) 12(2) *Cambridge Law Journal* 243, 247.

teachers, students, judges, and practitioners throughout the country, and indeed beyond. It would be an act of gross professional negligence to be without a copy at work, as well as one at home, if for no other reason than that its weight alone will exceed your luggage allowance or your strength at the end of a wearying day in court.

This book is weighty in both senses of the word. It stands out for many reasons.

First, it is written with all the benefit of more than 50 years of full engagement with the law, from a variety of perspectives: as an academic lawyer, as an advocate, as an intermediate appellate judge and as a judge of an ultimate appellate court.

Pausing there, the difference between these last two positions is one that assumes no little importance in the author's opinion but not, in his opinion, in the minds of at least some intermediate appellate judges.[13] This topic is one upon which the author dilates in forthright style in various parts of the text.[14] The New South Wales Court of Appeal's decisions in *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603; [2009] NSWCA 407 (**Franklins v Metcash**) and *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633; 310 ALR 113; [2014] NSWCA 184 come in for criticism.[15] That is not to say, however, that generous acknowledgement is not made elsewhere of decisions of intermediate appellate courts. The scholarly decision of Justice Joe Campbell, for example, in *Ryledar Pty Limited v Euphoric Pty Ltd* (2007) 69 NSWLR 603; [2007] NSWCA 65 (**Ryledar v Euphoric**) concerning whether it is a requirement for rectification to be granted that the parties' common intention be evident by "some outward expression of accord", and the same judge's decision in *Franklins v Metcash* in relation to the form of a decree for rectification (although not that aspect of the decision dealing with *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337; [1982] HCA 24), are singled out

[13] Heydon, above n 1, vii. On this theme, see JD Heydon, 'How Far Can Trial Courts and Intermediate Appellate Courts Develop the Law?' (2009) 9 *Oxford University Commonwealth Law Journal* 1.

[14] See, eg, Heydon, above n 1, [9.790], [9.920], [9.980], [9.1050], [9.1070], [13.170].

[15] Ibid, [9.980]-[9.990].

for praise.[16] As to *Ryledar v Euphoric*, Heydon describes it as a "most fundamental analysis" which "merits quotation" as "a summary does not do it justice".[17]

The author's own decision, when a member of the New South Wales Court of Appeal, in *Brambles Holdings Limited v Bathurst City Council* (2001) 53 NSWLR 153; [2001] NSWCA 61 also highlights the significant role that decisions of intermediate appellate courts can play in the faithful and clear distillation of the principles of contract law. The decision of Murray Gleeson, when Chief Justice of the Supreme Court of New South Wales in the *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540, that of Michael McHugh in *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* (1988) 5 BPR 97,326, and the joint judgment of Meagher, Handley and Cripps JJA in *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337 provide other examples.

But to return to the text and my first observation, the key point is that it is rare indeed for a textbook on such an important topic as the law of contract to be written by an author with such a wealth of practical experience, and the wisdom and insight born of that experience and the various perspectives that experience has afforded him. One distinguished exception, of course, is the trilogy of texts written or revived by the author's erstwhile colleague on the New South Wales Court of Appeal, the Hon KR Handley QC, whose works on res judicata,[18] actionable misrepresentation,[19] and estoppel by conduct and election[20] have been generously acknowledged and praised by the author, both in *Heydon on Contract*[21] and elsewhere.[22] Those works, as with *Heydon on Contract*, demonstrate not only the enormous importance for practitioner and judge alike of excellent legal textbooks per se, but the value in

[16] Ibid, [30.140].

[17] Ibid.

[18] Spencer Bowen and Handley, *The Doctrine of Res Judicata* (LexisNexis, 4th ed, 2009).

[19] Spencer Bowen and Handley, *Actionable Misrepresentation* (LexisNexis, 5th ed, 2014).

[20] KR Handley, *Estoppel by Conduct and Election* (Sweet & Maxwell, 2016).

[21] See, eg, Heydon, above n 1, viii, [14.270], [14.760], [14.780], [14.800], [25.70], [31.20].

[22] See the then Justice Heydon's remarks on the launch of the Hon KR Handley AO's 2006 work *Estoppel by Conduct and Election*: 'Estoppel by Conduct and Election' (2006/2007 Summer) *Bar News* 110.

having principle distilled by authors whose lengthy and distinguished professional careers have demanded and nurtured not only forensic insight, but the highest degree of rigour in the identification, formulation and application of legal principle.[23] Such authors also appreciate that the law cannot in practice be pigeon-holed. Thus where, for example, principles from the law of trusts and assignment must be understood fully to understand a contractual topic such as privity, those principles are discussed. As Heydon says, "purism" – which may otherwise have led to the exclusion of non-contractual topics in a textbook on contract – is not to be exalted over practicality and convenience.[24]

By way of contrast to the present work, most legal textbooks start their lives as the work of a young academic. Sir Guenter Treitel, for example, was 34 when the first edition of his classic *The Law of Contract* (**Treitel**) was published in 1962, some two years before Dyson Heydon went up to Oxford. But not all academic texts are of such quality as *Treitel*. As Heydon JA said, in response to an argument I made as a junior in *Union Shipping New Zealand Ltd v Morgan*,[25] in which (I suspect) I had not spared reference to the academy:

> "[A]cademic literature is, like Anglo-Saxon literature, largely a literature of lamentation and complaint. The laments and complaints can be heard even when academic wishes are acceded to."[26]

Whether or not that observation was wholly fair (and I recall having some thoughts about that at the time), it is a memorable example of the author's literary style and felicity of language.

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[23] Chapter 23, for example, includes a section headed "Forensic aspects of frustration": Heydon, above n 1, [23.150]ff.

[24] Ibid, [12.250]. In other areas, the reader is directed to specialist texts dealing with topics that may arise in contractual disputes but are only flagged in passing in the text. See, for example: in relation to statutory unconscionability, [18.80] and [18.90]; in relation to merger, ch 25.

[25] (2002) 54 NSWLR 690; [2002] NSWCA 124 at [98].

[26] Notwithstanding this sentiment, in his capacity as author of *Heydon on Contract*, the author generously acknowledges academic work he admires. Three examples are: DW Greig and JLR Davis, *The Law of Contract* (Law Book Co Ltd, 1987), referred to in the Preface at v; G Tolhurst, *The Assignment of Contractual Rights* (Hart Publishing, 2nd ed, 2016), referred to at [13.10]; and JW Carter, *Carter's Breach of Contract* (LexisNexis Butterworths, 2nd ed, 2018), referred to at [24.20].

The second general point I would make is that much of the law of contract is well settled. That is a good thing and what sophisticated economies require for the efficient functioning of trade and commerce. In those areas where the law is relatively settled, *Heydon on Contract* sets out with great clarity the relevant principles, provides ample citation in support of them and frequently descends from the general to the particular to highlight, in typically epigrammatic style, the way in which the established principle has been held to operate in particular factual circumstances. The discussion by the author of what acts may amount to an affirmation of a contract following an act or conduct by the counterparty that would have entitled the first party to rescind is a case in point.[27]

But there are areas of the law of contract where either the law is not fully settled or it is vague in its ambit,[28] where difficult cases have made bad law,[29] or where some major or subtle or insidious doctrinal divergences have emerged in common law jurisdictions. In these areas, the text adopts a very different style. It is a style which gives great insight into the author's mind and forensic personality. The learning underpinning that style has been described by Associate Professor Lee Aitken, a boon luncheon companion of the author, as "dodecohedral in the Daubian sense".[30] Whilst I must confess to lacking Professor Aitken's commitment to plain English language, the observation is apposite.

The third broad point to be made in relation to *Heydon on Contract* is that this is a book on the *Australian* law of contract first and foremost. This is not because the author is a republican, and there is no threat that he will join Mr Peter FitzSimons on the hustings in a red bandana (although it is an intriguing image). Rather, it is because the law of contract in Australia is undoubtedly distinct from the law of contract in England in a number of important and indeed fundamental respects.

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[27] Heydon, above n 1, [31.640]-[31.930].

[28] The author includes in this respect modern High Court authority on contractual illegality: ibid, [20.900].

[29] See, for example, the author's discussion of *Jackson v Horizon Holidays Ltd* [175] 1 WLR 1468 and *Albazero (Owners) v Albacruz (Cargo Owners)* (*The "Albazero")* [1977] AC 774: Heydon, above n 1, [12.160] and [12.170] respectively.

[30] L W J Aitken, 'Book Review: Selected Speeches and Papers' (2018) 37 *University of Queensland Law Journal* 329, 333.

Just because the text is avowedly one concerned with the Australian law of contract, however, it would be wholly erroneous to think that it does not deal with the English law of contract. It does – and at great and illuminating length – but this is not done as an act of slavish adherence; quite the opposite. It is to expose and explain the key differences which have emerged. These differences exist, for the most part at least, not because Australian law has diverged from English law as traditionally stated but because English law itself has moved in conspicuous ways. *Heydon on Contract* is essential reading for the "many [who] think that Australian law conforms with the modern English approach" and "others [who] think that Australian law *should* be made to conform with the English approach".[31]

The differences that have emerged are most fundamentally (but by no means only) associated with the law in relation to contractual interpretation and the law in relation to the rectification of contracts and other instruments.[32] The exposition and exploration of these differences in *Heydon on Contract* is informed at a human level by a dialectical engagement that began more than 50 years ago. Let me explain.

In 1966, Lord Franks, the legendary British civil servant, post-war Ambassador to the United States and philosopher, chaired a commission of inquiry into the University of Oxford. The Commission said that the famous Oxford tutorial system:[33]

> "[a]t its heart is a theory of teaching young men and women to think for themselves. The undergraduate is sent off to forage for himself… and to produce a coherent exposition of his ideas on the subject set… In [the tutorial] discussion the undergraduate should benefit by struggling to defend the positions he has taken up…"

Two years before the Commission's Report was published, a young but tall Rhodes Scholar from New South Wales had made his way down the Oxford High Street,

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[31] Heydon, above n 1, [8.250] (emphasis added).

[32] Many other differences are highlighted in the text. These include, for example: differences as to the operation of the doctrine of frustration on executed leases (ibid, [23.90]); differences as to the availability of damages for the disgorgement of benefits obtained by a wrongdoer (at [26.190]); and differences as to Lord Hoffmann's approach to remoteness of damage (at [26.590]).

[33] Franks Commission, *Commission of Inquiry: Report* (Clarendon Press, 1966) 101-2, quoted in David Palfreyman, 'Higher Education, Liberal Education, Critical-thinking, Academic Discourse, and the Oxford Tutorial as Sacred Cow or Pedagogical Gem' in Palfreyman (ed), *The Oxford Tutorial: 'Thanks, you taught me how to think'* (Oxford Centre for Higher Education Policy Studies, 2nd ed, 2008) 16.

turned right into the entrance to University College, then in its 715th year, and presented himself for tutorials in the undergraduate law course in a dank room near Magpie Lane. His tutor was a slightly older but equally tall South African Rhodes Scholar who had won the Vinerian Scholarship in 1957. This was the future Lord Hoffmann. Thus two towering – I was going to say "titanic" but that is not all that portentous – two towering intellects were thrust together in the unique and robust environment of the Oxford tutorial. Heydon himself would become the Vinerian Scholar in 1967.

In moving the vote of thanks to Lord Hoffmann following the Fifth John Lehane Memorial Lecture in 2010, the then Justice Heydon recalled their first meeting:[34]

> "It was a dark October night in 1964. We sat in his rooms in a part of the College called "Kybald", distinguished for gloomy Victorian architecture. There, solemnly and seriously, calmly and quietly, he explained how the system worked."

The lively debates between the two as to legal principle and philosophy and judicial method and technique that began that dark but auspicious October night in 1964 continue, more than 50 years later, in the pages of this book, for it is largely if not exclusively to Lord Hoffmann and the influence of his decisions in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, *The Starsin* [2004] 1 AC 715,[35] and *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 (**Chartbrook**) that Heydon attributes the divergence of English contract law from orthodoxy. This is done with force but, at the same time, much admiration. Thus he writes:[36]

> "Lord Hoffmann's exposition of the modern English approach is striking, brilliant and seductive. W B Yeats said that Bishop Berkeley's prose dripped with suave glittering sentences. Lord Hoffman's certainly does. In part those sentences highlight with extraordinary freshness some profound aspects of the traditional law. In part they go well beyond them."

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[34] JD Heydon, 'Speech in Honour of Lord Hoffman', in John Sackar and Thomas Prince (eds), *Heydon: Selected Speeches and Papers* (Federation Press, 2018) 59, 61.

[35] *Homburg Houtimport BV v Agrosin Private Ltd (The "Starsin")* [2004] 1 AC 715.

[36] Heydon, above n 1, [8.250]. In his footnote to this passage, the author is at pains to point out that "the application of Yeats's remark to Lord Hoffman is intended to be complementary." Whether or not the spelling of "complementary" is a rare typographical oversight or intentional is intriguing.

The reader of *Heydon on Contract* is left in no doubt, however, where the line between insight and heresy lies. Take the discussion of *Chartbrook*.

The difference between the approach in *Chartbrook* and that under Australian law is that, for the purposes of rectification, Australian law concentrates on the actual mental states of the parties as opposed to what a reasonable person might have conceived to be the common intention of the parties. This is a major doctrinal distinction. Under the heading "Australian and English Positions Contrasted"[37] the author "warms up" by describing academic discussions of *Chartbrook* as being "in their remoteness from forensic realities, … reminiscent of the constitutional schemes of the Abbé Sieyès". He was, of course, and as you would all recall, one of the chief political theorists of the French Revolution, famous for saying of France to Mirabeau that it was "a nation of monkeys with the throat of parrots". It could have been worse: as George W Bush reportedly said more than 200 years later, "[t]he problem with the French is that they don't have a word for entrepreneur."

But to return to *Heydon on Contract* and the assault on the law of rectification, the author writes that:[38]

> "English authorities since 2009 reveal the English position, even if clear in principle, to be very obscure in practical application. And even if one considers that it can be rendered clear in application, one may not like it. The persons in that frame of mind may console themselves. Like the weather in Melbourne, it will soon change."

Such change in England has, in fact, begun to happen. In delivering the 2017 Harris Society Annual Lecture at Keble College Oxford where, of course, Dyson Heydon had been a tutorial fellow, Lord Sumption said that:[39]

> "rather more than thirty years ago, the House of Lords embarked upon an ambitious attempt to free the construction of contracts from the shackles of language and replace them with some broader notion of intention. These attempts have for the most part been associated with the towering figure of Lord Hoffmann. More recently, however, the Supreme Court has begun to withdraw from the more advanced positions seized during the Hoffmann offensive, to what I see as a more defensible position."

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[37] Ibid, [30.180].

[38] Ibid.

[39] Lord Sumption, 'A question of taste: the Supreme Court and the interpretation of contracts' (2017) 17(2) *Oxford University Commonwealth Law Journal* 301, 303.

His Lordship also said on that occasion, in words with which Dyson Heydon would, I expect, fully concur, that:[40]

> "Judges are fond of speculating about the motives and practices of businessmen in drafting contracts. It is a luxurious occupation. The rules of admissibility protect them from the uncomfortable experience of being confronted by actual facts."

Returning to Mr Heydon and Lord Hoffmann, after his meteorological allusion to the weather of Melbourne, there then follows an extended and what may fairly be described as "Heydonesque" demolition of the *Chartbrook* decision and its forebears. It is a matter of note that in this discussion there is an interesting defence of Lord Denning and his decision in *Frederick E Rose (London) Ltd v William H Pim Junior & Co Ltd* [1953] 2 QB 450 which was heavily relied upon in *Chartbrook*. In short, the author considers it unfair to place the blame for the *Chartbrook* heresy on this decision. Thus he says:[41]

> "In point of principle, it is not enough to stigmatise what Denning LJ said because of the mere fact that it was he who said it. It is true that glory has departed from his reputation. The 'cloud-capp'd towers and gorgeous palaces' of the energetic judicial legislation he perpetrated over four decades have slid into ruins. But he had, with respect, exceptional legal learning and acuity. In this instance, and for his time, it is not his words in themselves that are wrong but what has later been made of them by numerous modern lawyers."

"Modern" is not a term of approbation in the Heydon lexicon.

The discussion and critique of *Chartbrook* in *Heydon on Contract* is illuminating on a number of levels. It draws out a fundamental difference between Australian law and English law on a centrally important topic. It tracks through what the author considers, rightfully in my opinion, a fundamental departure from orthodoxy. It does this by a close analysis of the cases which preceded *Chartbrook* and it highlights how a lack of rigour is apt to create doctrinal chaos. In all of this we see, as in other parts of the work, the stringent attention to detail, the closeness of the analysis and reading of the relevant cases and the depth of the author's scholarship and historical grasp. It was these characteristics which marked him out as a fine advocate and as a fine judge.

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[40] Ibid, 301.

[41] Heydon, above n 1, [30.220].

One other area in which there has been doctrinal controversy and indeed movement at the level of ultimate appellate courts relates to the doctrine of penalties. If I may say so, the discussion of the penalties doctrine in this text is the clearest I have ever read. That discussion includes but is by no means confined to the decisions in *Andrews v Australia and New Zealand Banking Group Ltd* (2016) 247 CLR 205; [2012] HCA 30, *Cavendish Square Holdings BV v Talal El Makdessi* [2016] AC 1172 and *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525; [2016] HCA 28.

In relation to that trilogy of decisions, the author notes (at [26.970]) that "the law has, at least superficially, travelled into a time of turbulence and disputation" and that these three decisions have attracted a vast amount of critical commentary "varying greatly in angle, tone and detail". The author calls out exaggeration of the extent to which the law in its practical operation has been unsettled by those decisions as well as "the allegedly unedifying character of what the Supreme Court and the High Court said about each other". Pouring cold water on what has excited many academics, he advises that "those who go to the cases in the hope of a titillating experience are doomed to bitter disappointment".

There is an interesting and diverting reflection on judicial technique manifested in the three decisions.[42] The discussion which follows then takes the reader clearly through *Andrews*, then *Cavendish*, then *Paciocco*, teasing out the differences both between the individual judgments in *Cavendish* and *Paciocco* as well as the differences between the three cases. There is then an invaluable analysis of the status in Australia of the four key propositions associated with Lord Dunedin's speech in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79 in light of *Paciocco*.

The final point I would make is that *Heydon on Contract* is written with such inimitable style and flourish that consulting it is far more than a routine matter of professional engagement as a starting or end point for research. It is a pleasure to read. Throughout, there are insights and reflections on themes not necessarily confined to contract law but about which the author has often spoken. These include

[42] Ibid, [26.970].

the merits or otherwise of joint judgments in ultimate appellate courts,[43] the importance of isolating the ratio decidendi in any case,[44] and the importance of expedition in commercial cases, both in respect of their hearing and disposition. He links the excessive use of extrinsic evidence to the clogging of the arteries of litigation. He writes:[45]

> "This is bad not only for litigation generally. It is bad for commercial litigation in particular. A commercial court is supposed to be a piepowder court. The merchants come in. They stamp the dust off their boots. They want a speedy answer. Commercial health – the health of individual traders and the health of the economy as a whole – depends not only on the direction of the circulation of money, but also on its velocity. Those who owe money should pay it speedily. Those who do not owe it are entitled to a judgment removing doubt about that point. Slowness in adjudication can result in the bankruptcy of traders despite the justness of their claims or defences. Many transactions and businesses are interconnected. Much legal process is instituted or defended unmeritoriously, in the knowledge that the court's delays can be exploited to deny justice. These abuses of legal process are massive in scale.
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> The trouble is that the English position is so liberal that even though it forbids recourse to negotiations, it tends to invite parties to prepare and tender negotiation material in the hope that all or part of it will be admitted as background material.
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> The cost pressures affecting large firms of solicitors operating under their expensive business models are notorious. In those circumstances a cynic might say that greater love hath no managing partner than this – the eruption of large-scale commercial litigation against a loyal and valued client. Even if most managing partners do not experience that emotion, commercial litigation involving analysis of contractual background does generate excessive discovery, huge tenders of ill-digested documents, the preparation of diffuse witness statements and prolix cross-examination."

I would take this opportunity to place on the record my strong endorsement of these sentiments and the explicit and implicit criticisms they contain.

As with especially the earlier editions of *Meagher, Gummow and Lehane*, there are also deployed throughout *Heydon on Contract* bon mots, literary allusions, and acerbic reflections which bring a smile to the reader who is otherwise occupied in a search for crystalline principle. Take, for example, the discussion of privity and the author's citation of the 30th edition of *Anson's Law of Contract*, edited by the former

[43] See, for example, ibid, [26.970].

[44] See, for example, the extensive discussion of Sir Anthony Mason's judgment in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337; [1982] HCA 24 in Heydon, above n 1, chapter 9, especially the remarks at [9.1200].

[45] Heydon, above n 1, [9.1520].

Lord Justice Beatson, the soon to be Lord Burrows, and Professor Cartwright. The author quotes from Anson the 'assertion' that:

> "In principle the promisee should also be able to recover substantial damages if, by reason of a breach of contract, the promisee (a) comes under a moral obligation to compensate the third party, though under no legal obligation to do so, or (b) voluntarily incurs expense in making good the default."

He then writes: "Apart from a noticeable odour of restitutionary sanctity, this passage has several problems."[46] These are then delineated with some vigour and zeal. You will recall my earlier observation as to the absence of shrinking violets on Eight Selborne.

Priceless, too, is the description of Sir Owen Dixon's concurrence with Sir Victor Windeyer's discussion of voluntary equitable assignments in *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 16. Of this, Heydon says:

> "[Windeyer's] judgment received a significant encomium from Dixon CJ, in the dying months of his much-admired career. The encomium was cool, perhaps. But it was real. And it was notable. For it was enunciated by a stern critic. From his lips or pen what seemed to be praise was rarely sincere. And what seemed to be sincere was rarely praise. He said: "I have had the advantage of reading the discussion contained in the decision of Windeyer J of the whole subject of voluntary equitable assignments and I do not know that there is anything contained in it with which I am disposed to disagree."[47]

It will not be said of this book, as Mr Heydon's great friend, the late R P Meagher AO QC, also of Eight Selborne, once memorably wrote of an English text on the law of trusts, that "[n]obody should yield to the temptation to buy this book, and the author, the publisher and the editors ought all be ashamed of themselves and each other".[48] Happily, entirely the opposite is true of *Heydon on Contract* (with the possible exception of the pessimist who signed off on the original print run). What was said, however, of the late Professor Treitel, who died only a matter of weeks prior to the

[46] Ibid, [12.140].

[47] Ibid, [13.10].

[48] R P Meagher, 'Book Review: An Introduction to the Law of Trusts' (1991) 8 *Australian Bar Review* 183, 184.

publication of this work, by the current Dean of the Oxford Law Faculty could well also be said of Dyson Heydon and this work:[49]

> "it was clear that Treitel and contract were well-suited. The law of contract provided ideal material for his rigorous doctrinal analysis and precise attention to detail, and his desire to impose some order on the case-law in particular."

This is a most significant publication, brilliantly written and splendidly produced, including an enormously useful table of contents and index. It is a great honour to have been asked to participate in its launch.

[49] Anne Davies, 'Guenter Treitel 1928-2019' (19 June 2019) University of Oxford, Faculty of Law <https://www.law.ox.ac.uk/news/2019-06-14-guenter-treitel-1928-2019>.