CHESHIRE & FIFOOT'S LAW OF CONTRACT 5th Australian Edition 1988 by J. G. Starke Q.C., N.C. Seddon and M. P. Ellinghaus. Sydney, Butterworths.

The fourth edition of this well-known work was published in 1981 and was co-authored by J. G. Starke Q.C. and P. F. P. Higgins, assisted by N. C. Seddon. The death of Professor Higgins in 1981 of necessity resulted in a change of authorship for the 5th edition published in 1988, with J. G. Starke Q.C., N. C. Seddon and M. P. Ellinghaus co-authoring the current edition. The opportunity thus afforded to restructure the text of the book has been taken by the authors, with a substantial part of it being completely re-written and much greater emphasis being placed on Australian case law, at times to the virtual exclusion of English decisions. This is a move to be welcomed, for in recent years the decisions of the Australian courts, particularly the High Court of Australia, have seen the development of principles of contract law which have diverged considerably from the English model. As the preface to the book notes (at p. ix) there has been since 1981 almost a torrent, rather than merely a stream, of Australian decisions in the domain of contract, with recourse being increasingly had to equitable principles. If this trend continues, it is this reviewer's opinion that a law of contract will eventually be established in Australia which will be uniquely Antipodean and which will have drawn upon the best principles to be found in the various common law countries of the world. The tendency to draw for example on the jurisprudence of Canada and the U.S.A. can be seen in the judgments in *Waltons Stores (Interstate) Ltd.* v. *Maher* (1988) 62 A.L.J.R. 110 and in *Taylor* v. *Johnson* (1983) 151 C.L.R. 422.

This torrent of case-law has inevitably meant, through no fault of the authors, that the book is in some respects already out of date. The law stated in the text is apparently that prevailed at December 1987 as that is the date of the preface. Accordingly, there is no reference to *Waltons Case* as establishing promissory estoppel as a weapon of offence in Australia or to the decision of the High Court of Australia in *Trident General Insurance Co. Ltd.* v. *McNiece Bros. Pty. Ltd.* (September 1988—to be reported) as heralding the eclipse of privity of contract in this country or to *Hawkins* v. *Clayton* (1988) 78 A.L.R. 69 (H.C.) as tending to obliterate the distinction between contract and tort at least so far as a duty of care and skill owed by a solicitor to his client is concerned. It is however the perennial risk which a legal text-writer takes that while the work is in the Press or has just been published, some landmark decision will be promulgated which renders much of which has been written either incorrect or out-of-date.

The new edition of the work has a fresh layout, with the former division of the book into 9 Parts being discarded in favour of 24 numbered chapters, the table of contents indicating which of the co-authors has written the particular chapter concerned. There are new chapters dealing with the question of severability in illegal and void contracts; with the construction of contracts and with discharge by non-fulfilment of

contingent conditions; the topics of duress, undue influence and unconscionability are now discussed in a separate chapter; the section on discharge of contract has been completely rewritten; and there are major revisions in the areas of promissory estoppel, mistake and misrepresentation to take into account landmark decisions and various statutory modifications and additions in these fields. There is also an historical introduction which is a necessarily brief and superficial account of the history of contract and an overview of the development of the law in the 18th and 19th centuries.

The section on formation of a contract is well written with a wide range of citations of relevant legal literature, including such journals as the Otago Law Review and the British Journal of Law and Society. Some Americanisms are to be found in the text e.g. "boilerplate" (p. 147) and "to take on board" (p. 1). There is a useful discussion on the battle of the forms (pp. 34-36) (although the reference to the Uniform Laws on International Sales Act 1967 (U.K.) in foot-note 129 is clearly inappropriate; there should have been a reference to the State legislation adopting the 1980 Convention on International Sales) but the impression gained by this reviewer was that some of the more difficult topics for discussion tended to be "glossed over". No doubt the desire to keep the book down to a moderate size inhibited discussion of some esoteric areas of the law but some indication could have been given for example of what were the differing views of the judges in *MacRobertson Miller Airline Services* v. *Commissioner of State Taxation ((W.A.)* (1975) 133 C.L.R. 125 and which view was to be preferred (p. 23), while there could have been a clearer discussion of the ramifications of *Port Jackson Stevedoring Pty. Ltd.* v. *Salmond & Spaggon (Australia) Ltd.* (1980) 144 C.L.R. 300 (p. 33). The author does not indicate whether he favours modifications to the privity of contract rule, but that would now appear to have been achieved by the High Court decision in the *Trident General Insurance Case.* In the section on the effect of silence the suggested distinction between acceptance by conduct (telling the auctioneer to remove the horse from the sale in *Felthouse* v. *Bindley* (1862) 142 E.R. 1037) of which the offeror is ignorant, and acceptance by conduct which is referable to what is asked for in the offer, that is, the offeree starts to perform, and again the offeror is ignorant of the action (p. 44) seems to be a distinction without a difference. And is it of any help to the reader to be left with a bare footnote (foot-note 181) saying in relation to *Felthouse* v. *Bindley* "Cf. *White Trucks Pty. Ltd.* v. *Riley* (1948) 66 W.N. (N.S.W.) 101 and *Boyd* v. *Holmes* (1878) 4 V.L.R. (E.) 161."? This simply leaves the reader to do his own analysis. There is no reference to the Unordered Goods and Services Acts of the various States in this context, and surely the argument based on estoppel at footnote 186 should have been expanded? In *Fairline Shipping Corpn.* v. *Adamson* [1975] Q.B. 180,189, the view taken by Kerr J. was that a cause of action could not arise by estoppel, even though he went on to say that the requisite elements of estoppel had not been made out. It is suggested that it is incorrect

to say that in that case the estoppel argument was acknowledged but failed on the facts (foot-note 186 p. 44). Incidentally the view that a cause of action cannot arise by estoppel may now be open to challenge in the light of *Waltons Stores (Interstate) Ltd.* v. *Maher* (supra).

It may be a surprise to some lawyers to learn that a cover-note is a valid agreement to agree (p. 64) or that it may be possible to have a conditional acceptance of a supplier's quotation, the condition being that the tender submitted to a third party in reliance on the quotation is the successful one (pp. 68-69). The proper analysis is surely to apply to the latter situation the principles of promissory estoppel used as a sword in the light of *Walton's Case.* Again, the reference to *Hall* v. *Busst* (1960) 104 C.L.R. 206 (footnote 314 p. 62) should have contained some mention of the doubt thrown on that decision by *Sudbrook Trading Estate Ltd.* v. *Eggleton* [1983] 1 A.C. 444 and *Booker Industries Pty. Ltd.* v. *Wilson Parking (Qd.) Pty. Ltd.* (1982) 149 C.L.R. 600, 616, while some criticism of the subjective test of what is finance satisfactory to the purchaser laid down in *Meehan* v. *Jones* (1982) 149 C.L.R. 571 (p. 72) should have been made. As matters stand, if a purchaser seeks to withdraw from a contract by saying that he is dissatisfied with the finance offered to him the onus is on the vendor to establish that he does not honestly hold that view—an almost impossible task in most circumstances.

The section on promissory estoppel as the law stood before *Walton's Case* is well written, although some Australian legal literature on the topic is ignored, while there is no discussion of proposals advanced from time to time for the reform of the doctrine of consideration.

Other examples could be given of what this reviewer perceives to be gaps in the text of the work but one further illustration will suffice. The discussion on anticipatory breach is very brief (pp. 623, 626) and little attempt is made to discuss the position where there has been a repudiation of the contract by one party and the other party is not himself ready, willing and able to perform his side of the bargain; or, if he is, whether he must tender performance on his part.

This question and the correctness of *Braithwaite* v. *Foreign Hardwood Co.* [1905] 2 K.B. 543 are of considerable practical importance and have been of some concern to Australian courts over the years, as witness the authorities referred to in the recent case of *Sunbird Plaza Pty. Ltd.* v. *Maloney* (1988) 62 A.L.J.R. 195.

The overall impression to be gained from this book is that while it gives a good account of the current state of the law in relation to certain aspects of contract, in other aspects it lacks depth. In these areas it is content to paint with a broad brush and to give bare references to relevant cases leaving the reader to explore and analyse the decisions for himself. It does not have the incisive approach of a work like Treitel. Nevertheless, it appears to contain most, if not all, of the Australian cases on contract and it provides a useful overview of the principles of contract

applicable in Australia, giving the reader appropriate references to relevant case-law to enable him to pursue a particular topic further should he so desire. As a work of reference it is useful to practitioner and student alike.

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