Singapore Journal of Legal Studies
[1995] 271 – 280

BOOK REVIEWS

CHESHIRE, FIFOOT AND FURMSTON'S LAW OF CONTRACT. (Singapore and Malaysian Edition). BY ANDREW PHANG [Singapore: Butterworths. 1994. xxi + 1006 pp (including index). Softcover: S$180.25 including GST]

IN the Preface to the above work, Dr Andrew Phang expressed his intention to integrate local case law in respect of the Malaysian Contracts Act into the basic text itself and to achieve an "unique blend ... a map of sorts for the local or foreign practitioner ...." In so doing, his path has not been an easy one as he eschews the easier (and self-defeating) path of merely providing a supplemental local edition of the English edition of *Cheshire Fifoot and Furmston*. Concomitant with his commitment to develop an autochthonous approach to local law, the author has to steer between the Syclla of uncritical acceptance of English law and the Charybdis of xenophobic reaction against the common law.

The tensions of sifting between what is indigenously acceptable part of English law and what is objectionable is implicitly acknowledged in Section D of Chapter 1. After referring to his earlier work (*The Development of Singapore Law*) for full statement of a case for indigenous development the writer admits that "the countervailing tide of pragmatism is a very powerful force indeed" and expresses a hope that "such pragmatism which wholly rejects any aspiration towards indigenous development" can be "met (and even overcome) in the long term". It is, however, admitted that the greater part of English contract law, "is by its generality as well as rationality" "eminently applicable to the local context". It would appear that (from this reviewer's viewpoint) the work may be evaluated as to how successful its endeavour to reconcile between these two poles ie the desire to develop an autochthonous approach principles of contract law and imperative of "pragmatism" is achieved. Furthermore, the author expressly rejects both parochialism and blind adherence to English law. This would commend itself to certain sections of the Malaysian legal community. The aspiration to develop a Malaysian approach to common law has been boldly stated by the former Lord President Tun Dato' Abdul Hamid Omar. This appears to be supported by the Malaysian government as a Committee has been constituted by the Ministry of Law to examine this issue. Whether Tun Hamid's successor YAA Tan Sri Eusoff Chin shares the same commitment to this has yet to be seen. The developments do not appear to have gone further in explicating the methodology by which the Malaysianisation of common law is to be achieved except that there would undoubtedly be a strong Islamic component in the new edifice of Malaysian contract law.

Under Section F of Chapter 3 (some factors affecting modern contract law) it would have been interesting to have had the writer's views of whether there are Asian cultural behavioural patterns in the conduct of Chinese, Malay or Indian commercial relationships which differ from the dominant western analysis of contractual behaviour.

In concluding Chapter 3 there is a hint that the dominant positivistic outlook of the judiciary and the legislature may sit uneasily with the advent of "the fairness doctrine". This unease which is symptomatic as to the state of contract law jurisprudence is stated in the following terms by one commentator:

> "In the twentieth century, a doctrinal crisis began that is still with us. Even as western law spread throughout the world, western legal scholars wondered if it was possible to have coherent legal doctrine. In the field of contract law, as we shall see, the problem was that the nineteenth century jurists had borrowed part of the earlier doctrinal system and had not managed to make that part work by itself. They claimed to be interpreting positive law. But the positive law did not simply enforce whatever the parties willed and only what they willed – nor could it. The positive law distinguished gift from exchange and one type of exchange from another. It held the parties to obligation that depended on the type of contract they had made even if they had not willed these obligations expressly. It sometimes released the victims of unequal bargains from obligations they had willed expressly. Twentieth century critics pointed out that the will theories could not explain these aspects of contract law. In fact, they were the very aspects that the late scholastics had explained with the Aristotelian notions of essence and virtue that the nineteenth century jurists had discarded.
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> The crisis has continued because the critics found themselves unable to rebuild the edifice they had raged. Grant Gilmore summed up the current state of contract law by saying: "The system has come unstuck and we see, presently, no way of gluing them back together again." (J Gordley, *The Philosophical Origins of Modern Contract Doctrine* (1991)).

Throughout the book Dr Phang interweaves his discussion on the state of the law with comprehensive references to existing case law in both the text and the footnotes. In fact the footnotes contain an exhaustive and invaluable list of local case references culled even from early case reports, *eg*, Kyshe and Straits Settlement Law Reports. Although it would be churlish to complain about such industry, the limits of synthesising of principles from case law development is ironically thereby demonstrated. By this, the reviewer means that very often the vicissitudes of the case would result in a fragmented or incomplete statement of the law. Through lack of industry on the part of counsel (although this excuse would be harder to justify in a contract dispute with Dr Phang's text at hand) or judicial misconstruction of principles some of the decisions are perhaps best consigned to the realm of judicial history. Court room anecdotes abound as to counsel's industry being exhaustive and exhausting the patience of the Court. As a sample of Dr Phang's approach this reviewer will comment on only two chapters, *ie*, Chapter 4 and Chapter 5.

In Chapter 4 (the phenomenon of agreement) Section A the writer stressed the criteria of objectivity as a test of agreement in a number of cases and rightly points to section 3 of the Malaysian Contracts Act as embodying this principle. It is, however, significant that, in citing the Privy Council's decision of *Daiman Development Sdn Bhd* v *Mathew Lui Chin Teck* [1981] 1 MLJ 56, the writer did not point out that there is an inherent tension even in the judicial language of Sir Garfield Barwick when he observed that "the question whether the parties have entered into contractual relationships with each other essentially depends upon the proper undertaking of the expressions they have employed in communicating with each other considered against the background of the circumstances in which they have been negotiating

...." It would appear that it is not only the external objective signs of the contract that are to be construed but the factual matrix of which it is expressed is to be construed. Such an approach appears to be more consistent with the Wittgenstein's fundamental insight that "It is in the stream of life that an expression has meaning". The dichotomy between objective and subjective approaches may find its resolution in later Wittgenstein's writings which points to a "holistic" theory of meaning.

In one recent English Court of Appeal decision of *G Percy Trentham Ltd* v *Archital Luxfre Ltd* [1993] 1 Lloyd's Rep 25, a further stimulant to judicial approach to an objective business approach and the issue of contract formation can be seen when Steyn J stressed the importance of contract performance of an executed commercial transaction as determinant of there being an established and binding agreement. For an interesting survey of the shifts of legal theories as to objectivity in contract formation (see C Dalton, "An Essay in Deconstruction of Contract Doctrine" (1985) 94 Yale L J 997, at 1039-44).

In the discussion of Section B (Offer and Acceptance), the writer accurately summarised the different nomenclature and rules as stated in the provisions of the Malaysian Contracts Act. In this context, the case of *Mbf Holdings Bhd* v *Emtex Corporation Bhd* [1986] 1 MLJ 477 is worth noting, as the Supreme Court of Malaysia there compared the term "offer" under the Take-over Code & Mergers with that of the Malaysian Contracts Act.

In the discussion of the postal acceptance rule in Singapore and Malaysia, the writer offers a tentative argument "that given the small size of Singapore, coupled with the efficient postal service, the postal rule might be disputed with ...." In a very lively historical discussion of the postal rule by Peter Goodrich, "Contractions: A Linguistic Philosophy of the Postal Rule," Chapter 5, *Language of Law, From Logics of Law to Nomadic Masks* (1990) a controversial analysis of postal rule is essayed for a post modern world.

In Chapter 5 (Consideration), Dr Phang helpfully highlights Chan Min Tat FJ's short decision (citing Illustration (a) to section 24 of the Contracts Act) of *K Murugesu* v *Nadarajah* [1980] 2 MLJ 82 which appears to endorse a bargain theory of consideration (which Cheshire, Fifoot & Furmston advocate). The judge said that "the rule that consideration can consist of mutual promises is now too well established to be questioned." The issue whether past consideration is good consideration in Malaysia, is one that plagued both the undergraduate student and the seasoned practitioner. Here again, Dr Phang cites Sharma J in *Guthrie Waugh Bhd* v *Malaippan Muthuchumaru* [1972] 2 MLJ 62 and the recent decision of Gunn Chit Tuan SCJ in *SEA Insurance Bhd* v *Nasir Ibrahim* [1992] 2 MLJ 355. This reviewer finds the confirmation that the "joint promisee doctrine" as laid down in *Coulls* v *Bagot's Executor and Trustee Co Ltd* [1967] 119 CLR 460 as being statutorily embodied in section 2 of the Contracts Act whilst drawing the distinction between the doctrine of priority with the principle that consideration may move from a party other than a promisee to be heartening.

The extensive discussion of the relationship of the doctrine of promissory estoppel and the effect of section 64 of the Malaysian Contracts Act bears careful reading and analysis. The dispensing of *Pinnel*'s case by section 64 and the parameters of such abrogation is finely discussed in the text. In Section E to Chapter 5 (Assessment), Dr Phang expressed his views as to the need for reappraisal of the doctrine of consideration. His call that "much needs to be done, lest legal ossification render consideration a topic noted only for its many academic intricacies whilst largely ignored by both bench and bar alike" should be heeded. It is interesting that Dr Phang appears to be hesitant as to whether codification can be an answer. This reviewer thinks otherwise. Although codification cannot be a complete panacea (as

there will be disputes as to construction of such a code), given the protracted development of case law and academic niceties of the doctrine nothing less than codification can begin to clear the morass in this particular field of contract law.

In the rest of the chapters of the book, Dr Phang offers both a compendious and encyclopaedic survey of the law in crucial topics of terms of contract, non-enforceability and illegality in contracts, mistakes, capacity, privity, performance and breach and the various modes by which a contract is discharged. An invaluable discussion is also attempted on the topic of remedies where copious references are made to local cases. This would prove to be a boon to practitioners.

All in all, the achievement of Dr Phang cannot be overpraised. The work is a resource for both the practitioner and scholar. For the undergraduates however, it may prove to be a bit daunting. The writer's scrupulous care and scholarly humility have the consequence that some of his evaluation of the state of the law is more tentative and equivocal than is desirable. This reviewer would have preferred a more robust re-statement. It is interesting to note that from across the causeway, is emanating scholarly efforts in developing an indigenous engagement of the Malaysian law. The legal scholarship in Malaysia should be given more impetus if it is not to be left behind.

This work is another example of Singapore legal scholarship being committed to an analysis of Malaysian legal developments. This could be attributable to a common historical genesis of the law. An ironical result of an indigenous development of the law in both Malaysia and Singapore would be that the family resemblance of the common law in each jurisdiction may well be transformed so that they can no longer be discussed together. This writer is also skeptical (short of a revolution in the political realm) that the indigenization enterprise would succeed. As a chastened but nonetheless unrepentant Weberian (see M Weber, *Economy and Society* (1968)), the reviewer remained convinced that unless the codification is introduced which would determine statutorily the paradigm upon which contract law will then develop, the market driven economy will sweep aside any residual efforts at recognition of custom and local circumstances. If Dr Phang is desirous of an autochthonous development of the law, the help of the legislature would have to be enlisted to achieve that goal; otherwise it would be a Sisyphean task of such dimension that no judge or scholar could resolve. The open economy of both countries in the wake of globalization would surely militate against indigenization of contract law. Part of the predicament that faces Dr Phang's enterprise is reflected throughout this work – that of reconciling a universal and local jurisprudence of contract law. The agon of Dr Phang's authorship is the pursuit of a Utopia of a commodious local legal community via the enterprises of indigenizations.

JN Hart has argued that the covenant is "the moral heart of the community and the contract the amoral heart of the corporation" (JN Hart "The Pathos of Community in Contemporary Culture" in *The Critique of Modernity: Theological Reflections on Contemporary Culture* (1986) 1980).

In Dr Phang's juristic effort is discerned the ambition to re-mend the broken covenant of the community. The map that he has drawn will serve to guide all further endeavour in the practice and reform of contract law in both Singapore and Malaysia.

PHILIP KOH