Exploring Contract Law BY JASON W NEYERS, RICHARD BRONAUGH AND STEPHEN G A PITEL, eds. [Oxford and Portland, Oregon: Hart Publishing, 2009. 430 pp. Hardcover: £75]

If the subject of contract law can be analogised to a tangible destination, then it becomes possible to speak of "exploring" it. This is precisely what *Exploring Contract Law* seeks to do. With a signpost on its cover pointing to the major topics in contract law, this book is a collection of fifteen original essays that originate from papers presented at a symposium titled "Exploring Contract Law" held at the University of Western Ontario Faculty of Law in January 2008. But the simple, one-dimensional exploration of major contract law topics does not adequately describe what this book tries to do. Instead, presenters at the symposium were asked to explore contract law in one of three ways: they could (a) "(re)explore doctrines that are considered tangential or antiquated"; (b) "explore what appeared to be settled

principles in light of recent case law developments"; or (c) "explore black letter contract law from a theoretical or comparative perspective". The final product actually goes beyond these three categories and engages the reader on another plane: the divide between theoretical and practical issues; indeed, some of the essays take so broad and theoretical a perspective that the appropriate visual depiction is not the where the signpost points, but what the signpost itself should be.

A few preliminary words could be said about the structure of the book. The exploration of contract law in the book proceeds (generally) from a distinctively funnel-like approach following the way chapters are organised. Whilst the first few chapters take a more abstract discussion of broad questions, the subsequent chapters gradually shed off that abstractness and approach specific questions with reference to concrete examples in contract law. This way of organising the book has the merit of familiarising the reader to the general before engaging him or her in the particular, if indeed one chooses to read the book from cover to cover. Otherwise, a fairly detailed introductory chapter by the editors point the way to more specific issues a reader might be interested in.

The first two chapters immediately raise the "big" questions of contract law in relatively abstract fashion. Stephen Smith's chapter opens the book with a suitably broad question: what are the limits of contract law? To know the limits of contract, one must, perforce, define the scope of contract law. Smith would demarcate contract law's scope in terms of two borders: a "horizontal" border, which separates contract law rules from rules identifying other obligations that operate on the same plane as contractual obligations; and a "vertical" border, which sets the boundary between contract law and the general part of the law of obligations. Bemoaning legal scholars' neglect of the vertical border, Smith writes that this has perpetuated the misunderstanding of certain rules as contract law rules. A consequence of this is the failure to make appropriate generalisations—the attempts to link rules governing damages to the nature of contracts being an "obvious" example. The task of introducing this vertical border, and thereby provisionally knowing the limits of contract law, is the main occupation of Smith's chapter. In the end, although it is not possible for Smith to define the limits of contract law in so limited a space, his thought-provoking piece, written in a customarily clear and engaging style, draws attention to this important preoccupation.

If Smith's chapter provides the impetus to surge ahead into a world of obligations marked by general and specific parts, then Helge Dedek's chapter sounds a word of caution. To be sure, Dedek does not seek to evaluate whether such a classification is "a legitimate or useful one". He instead demonstrates, through a comparative look at the German expression of the civilian law tradition, how a classification that excludes certain areas from contract law risks "obscuring certain connections that can only be seen when looking at contract law in a more inclusive way". The key problem he identifies is the "hardening of categories", which refers to the reluctance to re-examine the appropriateness of legal categories once formed. Aptly illustrating this point through various courts' treatments of "reliance interest" damages, Dedek argues that because taxonomy in the law is not merely descriptive, but prescriptive and normative in nature, one must be willing to relook such legal categorisation if changes call for that. But more broadly, the borders of legal categories must always be kept open to prevent the curtailing of ideas; indeed, as Dedek appropriately quotes,

"the map is not the territory" (Alfred Korzybski, *Science and Sanity: An Introduction to Non-Aristotelian Systems and General Semantics,* 3rd ed. (New York: Institute of General Semantics, 1948) at 58).

The next three chapters ask similarly broad questions, but are anchored somewhat to concrete contractual doctrines for ease of illustration. The first of these, Stephen Waddam's chapter is concerned with a deceptively simple problem: what does it mean to speak of "principles" of contract law? Judges, lawyers and scholars alike speak of contractual principles, which in one sense presuppose that the rules labelled as "principles" are immutable, eternal and universal. However, through an examination of the doctrine of consideration, Waddam convincingly shows that this presupposition of the nature of "contractual principles" may well have to be relooked. Waddam shows that it is not possible to reduce the doctrine of consideration to principles that have remained relatively stable even over a short period of time. That this is true can also be seen in the local context: the Court of Appeal's recent decision of *Gay Choon Ing v. Loh Sze Ti Terence Peter* [2009] 2 S.L.R. 332 at least hints of the possibility that the principles governing consideration in Singapore may be reconsidered in the future (see also Goh Yihan, "Compromising on Consideration in Singapore: *Gay Choon Ing v. Loh Sze Ti Terence Peter*" (2009) 23 Commercial Law Quarterly: The Journal of the Commercial Law Association of Australia 11). While this does not discount the utility of "principles" in legal reasoning, paradoxically, as Waddam notes, the concept of principles has succeeded "only by appearing to be what it is not". At this point, it might be appropriate to point to Andrew Gold's chapter, which is concerned with the morality of promising and consideration. Gold defends the doctrine of consideration as justifying an augmented moral right that cannot otherwise exist if the promise had been gratuitous. This stands in contrast to Seana Shiffrin's thesis that the doctrine of consideration diverges from promissory morality (see Seana Shiffrin, "The Divergence of Contract and Promise" (2007) 120 Harv. L. Rev. 708).

Catherine Valcke's chapter is truly a work of comparative enterprise. Focusing on the *reasoning* (as opposed to the rules) used in contractual interpretation cases from both common law and civil law jurisdictions, she seeks to "connect the rules and institutions of each system to one another and to contrast them between systems". This exercise may be especially relevant in the Singapore context, following the Court of Appeal's seminal decision of *Zurich Insurance (Singapore) Pte Ltd v. B-Gold Interior Design & Construction Pte Ltd* [2008] 3 S.L.R. 1029, which restated the rules of contractual interpretation in Singapore, and which has since been followed by close to twenty local decisions. However, rather than just citing the rules in *Zurich Insurance* in a vacuum, Valcke's chapter helps us understand *why* the rules (and reasoning) are as they are. More broadly, the comparison of contractual interpretation in civil law and common law jurisdictions helps us understand the differences between these two jurisdictions' conceptions of contract law itself.

After the broad questions of the opening five chapters, the next few chapters gradually ease the reader back into more specific, but no less interesting, issues in contract law. Charlie Webb's chapter kicks off an examination of contract law through the law of remedies with the ageless question: what justifies the award of monetary damages when it is the obtaining performance that is contracted for? Webb concludes that the recognition of a right to performance requires that claimants

are not limited to recovery of losses caused by the defendant's breach, but should be given performance wherever possible. However, this conclusion, Webb freely admits, is built upon propositions which themselves require further elucidation: why a claimant should be accorded a right to performance and whether this is a necessary consequence of all contracts. Nonetheless, Webb's detailed chapter at least points the way to justifying damages fully. Robert Stevens' chapter follows closely on the theme of damages and the right to performance by way of an evaluation of the decision of the House of Lords in *Golden Strait Corporation v. Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 A.C. 353. Thoroughly worthy of mention is Stevens' engaging style—he begins with a personal (and amusing) story of his wife's wedding ring changed colour to introduce the proposition he advances: damages awarded as a substitute for the contractual right should be differentiated from those awarded to compensate for consequential losses suffered. Stevens substantiates his chapter with a detailed and convincing analysis—including examples drawn from different types of contracts—and concludes that the result in *The Golden Victory* is defensible on the basis of the distinction he advocates.

The three chapters that follow are concerned with the boundaries of contract law from a "horizontal" perspective. Constraints of space prevent an in-depth survey of these chapters; suffice it to say that Andrew Robertson discusses whether proprietary and equitable estoppel form part of the law of contract, Gerald Fridman discusses the interaction between contract and tort, and finally, Mark Gergen investigates the interaction of contract and the law of wrongs. From an organisation point of view, these chapters could perhaps have been placed elsewhere rather than after the chapters on remedies, since they do raise some "general" questions about contract law. These chapters also come right before a series of five chapters discussing specific doctrines of contract law and therefore sit uneasily between the remedies chapters and these specific chapters. Notwithstanding this very minor stylistic point, each of these chapters offers an analysis of a familiar concern about the uniqueness of contract law, and its lateral relationship with other fields of law which may appear, in some aspects at least, to be superficially similar.

The final five chapters return to the more familiar analysis of specific doctrines of contract law. Andrew Tettenborn's and Tham Chee Ho's chapters should be read in tandem, for they concern the same issue of assignment, and specifically the decision of the English Court of Appeal in *Don King Productions Inc v. Warren* [2000] Ch 291. Kelvin Low's chapter on the English Court of Appeal's much-discussed decision, *Great Peace Shipping Ltd v. Tsavliris Salvage* [2003] Q.B. 679, goes against the grain of most academic critiques of the case by suggesting that it in fact allows the common law scope to develop its remedies of mistake beyond that of declaring the contract void *ab initio*. As the present state of Singapore law stands, it is unclear whether *The Great Peace* would be followed to abolish the doctrine of common mistake in equity here. Whilst the case has been cited approvingly on some occasions—most recently by the High Court in *Wong Lai Keen v. Allgreen Properties Ltd* [2009] 1 S.L.R. 148—the courts have given little hint of their attitude towards the case's effect on common mistake in equity save for distinguishing it in *Chwee Kin Keong v. Digilandmall.com Pte Ltd* [2005] 1 S.L.R. 502 as being inapplicable in unilateral mistake. When the time finally comes for Singapore courts to consider whether common mistake in equity should continue to have a place in Singapore

law in light of *The Great Peace*, Low's chapter would surely offer a valuable point of view. Next, Mindy Chen-Wishart's chapter discusses *Smith v. Hughes* (1871) L.R. 6 Q.B. 597 with the objective theory of contract formation in mind. As she notes, *Smith v. Hughes* is "a venerable and often cited case", and familiar to students especially. However, familiarity can breed contempt, and Chen-Wishart's chapter is a powerful reminder of this as she guides us through certain misconceptions and misunderstandings about the case. A very useful table summarising her analysis at the end of the chapter provides a good reference point for the "stabilisation" of the terms used in this area of contract law and should, as with *Smith v. Hughes*, be prescribed to students as mandatory reading. Finally, Rick Bigwood's chapter examines undue influence, with special emphasis on the courts' analysis when the undue influence is presumed from the relationship between the parties instead of being found on the facts.

In summary, *Exploring Contract Law* is a worthwhile collection of essays to have in any library. As with books of this nature, one may quibble with the lack of a list of cases or an index—for the inclusion of both or either would surely unearth the many riches of painstaking research more easily—but the present volume more than overcomes such shortcomings with the high quality of its contributions. Far from just pointing the way to various topics in contract law as depicted by the signpost on its cover, this book may well be *the* signpost that points the way to how exploration of contract law could be done in the future. This is a systematic and engaging way of exploration; indeed, this way of exploring contract law transcends beyond the one-dimensional doctrinal study of contract law, and promises to be an intellectual feast for the reader.

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