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BOOK REVIEWS

Contract as Assumption II: Formation, Performance and Enforcement BY BRIAN **COOTE**, ed by J W **CARTER** [Oxford: Hart Publishing, 2016. xxxiv + 233 pp. Hardcover: £55.00]

The saying that we "stand on the shoulders of giants" couldn't be more apt for Emeritus Professor Brian Coote CBE, who has influenced and stimulated our thinking about modern contract law in so many ways. Just one example of this influential scholarship, which features in this volume, is Coote's unorthodox but persuasive view of exemption clauses as demarcating the primary obligations under the contract, rather than acting to protect from a liability that otherwise arises. Coote's modest remark in the final chapter of this book, "[w]ho is interested in my kind of contract anyway?" (at p 206) belies the attention paid to his insights by scholars all over. As the title of the volume indicates, this text continues the theme of an earlier volume, *Contract as Assumption: Essays on a Theme* (2010). In this book, edited and prefaced by Emeritus Professor John Carter, another contract giant and fellow antipodean, contract scholars are offered a second collection, mostly of Coote's previous writings that were previously published in books or eminent journals including the Cambridge Law Journal, Journal of Contract Law and the Modern Law Review. Each of the republished chapters has seen slight changes from the original as part of Carter's editing contribution. The predominant focus is on aspects of contract formation, explored against the background of Coote's theory of contract as assumed, not imposed, obligations.

Chapter 2 starts the collection by exploring the meaning of intention, in particular, the objective/subjective intention dichotomy in contract formation, and why objective intention generally suffices. The chapters that follow analyse a diverse range of contract conundrums: communication of acceptance and the problem posed by certain modes of communication, particularly those that are instantaneously transmitted but not necessarily instantaneously received (Chapter 3); the true basis of *Dunlop v Lambert* (1839) 6 Cl & F 600, 7 ER 824 (HL), the predecessor of *The Albazero* [1977] AC 774 (HL) exception to the privity doctrine, and the ability of the promisee to recover for a breach of contract (Chapter 4); sale by auction without reserve and the highest bidder's right against an auctioneer who fails to accept the bid (Chapter 5); and the meaning of the implied term that the goods sold must correspond with their description (Chapter 6). The following two (or one might say

three) chapters are interrelated, and explore: discharge for breach, the abolition of the doctrine of fundamental breach, its implications for the carriage of goods rules governing deviation, and the effect on exemption clauses (Chapters 7 and 8, Parts I and II); next comes contractual illegality and why the difficult case of *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65 (CA) deserves support (Chapter 9). In the penultimate chapter, Coote advances his argument that secondary obligations, *ie* the consequences of breach, are also assumed rather than imposed (Chapter 12).

In Coote's view, articulated in the "Introduction" (Chapter 1), two of the chapters are outliers, in that they examine remedial rather than formation issues and delve beyond contract into the overlapping area of tort. The first of these chapters considers how tort and contract law respond to claims based on a loss of chance and the different requirements of proof required for physical and economic loss (Chapter 10); the second turns to another enduring conundrum: whether increased losses on breach occasioned by the claimant's impecuniosity are recoverable as damages, a question that most scholars will naturally associate with *Owners of Liesbosch Dredger v Owners of Steamship Edison* [1933] AC 449 (HL) (Chapter 11). Coote's incisive analysis is followed by a helpful summary of the governing principles.

The concluding chapter, "Contract: An Underview" (Chapter 13) is Coote's valedictory lecture at the University of Auckland in 1994. It has received only limited circulation until now. In this chapter, Coote does three things. First, he affirms his allegiance to legal formalism, *ie* the essential coherence of the common law and its ability to solve legal problems. Here he also offers an explanation for the rise of American realism, the antithesis of formalism, by pointing to the diverse, federal structure of the United States as opposed to a unitary structure (typified by New Zealand and the United Kingdom) which is more conducive to formalism. Second, he elaborates on his theory of contract as an assumption of obligations, which is central to this book. Coote expands on how this view of contract illuminates our understanding of consideration, contractual intention and damages. Third, Coote identifies, with examples, what he calls "five traps" (at p 220) that contract law has fallen into and the problems it has caused: unwarranted generalisation—*eg*, deriving a principle of good faith from the fraud and unconscionability defences; mischaracterisation—*eg*, analysing a problem of uncertainty as one of mistake; imprecise terminology—here Coote offers many examples including the use of "rescission" to cover termination for breach as well as setting a contract aside ab initio; black-and-white reasoning rather than acknowledging that sometimes it's grey; and inconsistency or, in his words: "failure to accept the implications of one finding for another" (at p 223). Coote ends on the sanguine note that what matters most is the ability to correct past mistakes, even if corrections via the common law process take time. To mention just one example of a legal error identified by Coote as awaiting correction is the decision of the English Court of Appeal in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 (CA). His objection is the failure to recognise the distinction between consideration and performance, and that consideration in a bilateral contract cannot be its performance.

In summary, this collection brings together some of the thought-provoking, still relevant and carefully reasoned views that characterise one of the greatest contract

scholars of our time. Thanks to his prodigious output, it cannot be a comprehensive compilation, which in turn raises our hopes that more will still be in the offing.

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