*Carter's Breach of Contract* BY J W **CARTER** [Oxford: Hart Publishing, 2018; see also Australia: LexisNexis Butterworths, 2018. lxxvi + 738 pp. Hardcover: £180.00]

The author of this treatise holds the positions of Emeritus Professor of Law, University of Sydney, General Editor of the *Journal of Contract Law* and Consultant to Herbert Smith Freehills. Earlier versions of Emeritus Professor Carter's treatise on breach of contract (previously published in 1984 and 1991, and substantially reworked and retitled as a 2012 first edition with Hart Publishing) have taken their place in the canon of leading works focusing primarily on this topic (other recent additions include John Stannard and David Capper, *Termination for Breach of Contract* (2014) and Neil Andrews, Malcolm Clarke, Andrew Tettenborn and Graham

Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies* (rev 2017)).

The significance, and on the other hand, persistent confusion, over the principles governing termination for breach and related issues, are underscored by a number of recent publications in leading journals seeking either to restate fundamental principles or challenge them (see for instance, Neil Andrews, "Breach of Contract: A Plea for Clarity and Discipline" (2018); Frederick Wilmot-Smith, "Termination after breach" (2018); David Foxton QC, "How useful is Lord Diplock's distinction between primary and secondary obligations in contract?" (2019)).

In this regard, Professor Carter's latest edition is a most welcome and important contribution to the evolving landscape, as a comprehensive statement of English and Australian contract law which also includes in its coverage a significant comparative dimension. It should be noted that, in addition to discussing the case law and statutory developments across the United Kingdom, Australia, New Zealand and Singapore in the intervening years since the previous edition, this updated work also incorporates discussions from a number of significant papers published recently by Professor Carter solely or in conjunction with co-authors (in particular, see J W Carter & Wayne Courtney, "Breach of Condition and Express Termination Right: A Distinction with a Difference" (2017); J W Carter, Wayne Courtney & Gregory Tolhurst, "An Assimilated Approach to Discharge for Breach of Contract by Delay (2017); J W Carter, Wayne Courtney & Gregory Tolhurst, "Two Models for Discharge of a Contract by Repudiation" (2018)).

For those unfamiliar with the structure of the text, Professor Carter helpfully provides a form of a restatement of the principles governing breach in 13 articles (collated in the Appendix), across five well-organised parts (I. Proof of Breach and Bases for a Right to Terminate, II. Breach of Contractual Terms, III. Repudiation and Anticipatory Breach, IV. Election and V. The Consequences of Termination) which assist in directing the reader's attention to key concepts amidst the rich and extensive discussion drawing from historical, doctrinal, comparative and critical perspectives. As a treatise focusing primarily on breach, the author is able to cover in an in-depth fashion various issues that would not be given the same level of coverage in even the most comprehensive contract textbooks or treatises: see for instance the discussion on the treatment of time stipulations in common law as opposed to equity and the interpretive controversies surrounding the applicable statutory rules in this respect at pp 182-187; see also Carter, Courtney & Tolhurst (2017).

One point worth noting is that Professor Carter's treatise is underpinned by a particular theory of breach, which is based on a 2012 article in the *Law Quarterly Review* ("Discharge as the Basis for Termination for Breach of Contract") the key points of which he brings to the fore more fully in this edition. According to this theory, "the common law confers a right to terminate the performance of a contract whenever the promisor's breach of a contractual term, or the promisor's conduct, is sufficient in itself to discharge the promisee" (at p viii), *viz*, the promisee is entitled to termination at common law because he or she is discharged by the relevant breach (at p 109).

This is an original idea that carves out space within the dichotomy of the more familiar "elective" versus "automatic" theories of termination, *viz*, whether a breach which justifies termination gives the promisee the option to terminate or affirm, or

whether the promisor's breach operates automatically and unilaterally to bring the contract to an end (see further Andrew Burrows, "What is the Effect of a Repudiatory Breach of a Contract of Employment" (2013) and David Cabrelli & Rebecca Zahn, "The Elective and Automatic Theories of Termination at Common Law: Resolving the Conundrum?" (2012)).

Professor Carter's thesis may at first glance come across to some as a version of the automatic termination theory (in *Treitel on the Law of Contract* (rev 2015) at p 955, the discussion on "no automatic termination" suggests in a footnote that the contrasting view is adopted by Professor Carter in his 2012 article), but it is actually quite different and distinctive. The idea appears to be that while both parties' obligations remain outstanding under the elective theory until the promisee opts to terminate, and contrastingly both parties' obligations are automatically discharged upon a breach justifying termination under the automatic theory, in Professor Carter's view, a breach justifying termination suffices to discharge the promisee from its obligations to perform, but not the promisor's. The purpose of election is accordingly for the promisee to either affirm and reinstate its obligation to perform, or to terminate and bring the promisor's duty to perform to an end (at pp 107-109). This is an interesting and novel view on which Professor Carter elaborates with careful historical and doctrinal argument.

A number of points of relevance may be raised for the local audience who are accustomed to working through issues of breach through the well-established framework under *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR (R) 413 (CA), with its taxonomy of Situation (1) express termination rights, Situation (2) renunciation, Situation (3)(a) condition-warranty approach and Situation 3(b) breach of an intermediate term which deprives the innocent party of substantially the whole benefit of the contract (see the recent authoritative discussion in Andrew Phang JA & Goh Yihan, "Contract Law in the Commonwealth Countries: Uniformity or Divergence" (2019) at pp 206-216).

Professor Carter is keen to emphasise a sharp contrast between express and common law termination rights (at pp 82-85, and his 2017 article referenced above), with its relevance in areas such as recovery of loss of bargain damages a point which has likewise been underscored by Singapore courts sensitive to the different remedial consequences of Situation (1) as opposed to Situations (2) and (3) (see *Sports Connection Pte Ltd v Deuter Sports GmbH* [2009] 3 SLR (R) 883 at para 55 (CA); *Tan Wee Fong v Denieru Tatsu F&B Holdings Pte Ltd* [2010] 2 SLR 298 at paras 30-33 (HC); *Max Media FZ LLC v Nimbus Media Pte Ltd* [2010] 2 SLR 677 at para 35 (HC)).

Secondly, Professor Carter clarifies the notion of "repudiation" as describing "a clear absence of readiness or willingness to perform satisfying the requirement of seriousness" (see Chapters 7-9) which relates to the subjective intention of the promisor in refusing to perform (albeit objectively inferred), and is critical of attempts to conflate repudiation with, or translate repudiation into, other common law bases for discharge such as breach of condition or intermediate term which relate more objectively to failure to perform (see also the 2018 article referenced above). The rationale for repudiation as a basis of discharge is that this communicated lack of readiness or willingness to perform contradicts the assumption of the performance obligation undertaken by entry into a bilateral contract (at p 298) (see also the exposition of the

juridical foundation of anticipatory breach in *The "STX Mumbai"* [2015] 5 SLR 1 at paras 49-51 (CA)).

This is a useful reminder for our local jurisprudence as well, given that courts at times tend to group all grounds for termination (Situations 1 to 3) as "repudiatory" for easy reference (see for instance *Royal Melbourne Institute of Technology v Stansfield College Pte Ltd* [2018] SGHC 232 at para 39). While this may not be a major issue given that our practitioners and courts have the benefit of the *RDC* framework to pinpoint the specific ground of termination applicable in the case, it is a salutary reminder that the idea of renunciation under Situation 2 (see *Biofuel Industries Pte Ltd v V8 Environmental Pte Ltd* [2018] 2 SLR 199 at para 20 (CA)) has a separate conceptual basis from Situations 3(a) and (b), and while the facts may give rise to both scenarios, neither can be completely assimilated into the other.

Lastly, Professor Carter helpfully discusses some recent case law on "best endeavours" and "best efforts" clauses (at pp 72-74), including references to the High Court of Australia decision in *Electricity Generation Corporation v Woolside Energy Ltd* (2014) 251 CLR 640 (HCA) and the Singapore Court of Appeal decision in *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 (CA) (see J W Carter, Wayne Courtney & Gregory Tolhurst, "'Reasonable Endeavours' in Contract Construction" (2014) and Yip Man & Goh Yihan, "Default Standards for Non-absolute Obligation Clauses" (2014)). The construction of such clauses is a thorny issue that has arisen in a number of cases since then including *Lim Sze Eng v Lin Choo Mee* [2019] 1 SLR 414 (CA) and *Cheong Chee Hwa v China Star Food Group Ltd* [2019] SGHC 86, which have followed the guidelines in *KS Energy*. As Professor Carter notes, whatever the adjective applied to the obligation, the question is whether the promisor has acted reasonably (at p 73). This is consistent with the observations in *Lim Sze Eng*, adopting *KS Energy*, that the exercise is ultimately fact-intensive, and the extent to which an obligor is required to sacrifice its own commercial interests in meeting its obligations under the clause depends on the nature and terms of the contract (*Lim Sze Eng* at para 74), without undue weight being placed on the relevant label. The label might serve as a proxy for the level of commitment involved, which then has to be textually and contextually ascertained or confirmed, rather than functioning as a 'knock-down' argument for the claimant in demonstrating breach.

The above observations merely skim the surface of Professor Carter's rich analysis and cannot do justice to a 700-page book. In a review of the previous edition of this book, Professor Neil Andrews (2013) described Professor Carter's work as "a mine of useful information and stimulating analysis" (at p 217). This latest edition is *a fortiori*, deserving of this assessment for the reasons mentioned, and should readily find its place on the shelves of academic lawyers and practitioners as a treasure trove of invaluable insights and an indispensable point of reference both for scholarly research and to tackle difficult points of law in contract litigation.

ZHONG XING **TAN**
Assistant Professor
Faculty of Law, National University of Singapore