FOREWORD

THE HONOURABLE SIR ANTHONY MASON*

The theme of this issue "Contract: Death or Transfiguration?" has its origin in Grant Gilmore's influential work *The Death of Contract* published in the United States in 1974. The authors of the articles in this issue declare in unambiguous terms, even if only by implication, that contract is alive and vigorous. No doubt Gilmore would say that they have only reached this verdict after applying artificial resuscitation and giving the patient a massive transfusion of equitable doctrine. Whether Gilmore is right or wrong does not seem to matter very much. But the question excites interesting speculation in much the same way that meditative contemplation of the confluence of the waters of the Rhone and Saone at Lyon has stirred great minds to profound thoughts about the operation of the Judicature Acts. And so here the authors offer their views on some of the current trends in the law of contract, including the impact of equitable doctrine, and the concept of good faith, which has imparted a new vitality to this branch of the law. Public and administrative law is another source of that vitality as the article on Government Contracts by Dr Margaret Allars clearly shows. Much the same comment has been made about the fiduciary relationship. However, Professor Finn's discussion of that topic indicates that this rich ore body has been almost fully explored, largely as a result of Professor Finn's illuminating writings. It is to be hoped that he will direct his energies to another field of law in need of rationalisation and renewal and illuminate it with the same conspicuous success.

For the most part, academic lawyers applaud this new-found vitality. On the other hand, many practitioners gnash their teeth and mutter darkly about the difficulty of advising clients when the law is in a state of flux. And there are others who think that unconscionability has gone, if not too

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far, just about as far as it can go. The development in doctrines based on unconscionability is partly explained by the fact that our sense of what is unconscionable conduct is today much more comprehensive than it used to be. We - and I suppose I am speaking of judges - are more easily shocked than we used to be by harsh conduct. However, we should not debase the concept of unconscionability by applying that label to conduct which is merely unfair. There is the objection that if contracts are to be set aside on the ground that they are unfair judges would run some risk of deciding cases by reference to personal and subjective opinions rather than by reference to acceptable standards. Deciding what is unfair in a procedural context does not encounter the same objection.

To those who are familiar with the more recent decisions of the High Court, it is apparent that some of the advances that have been made reflect developments in legal principle that have taken place in the United States. Mr Justice Priestley's article contains a valuable discussion of the uses and abuses that can be made of United States materials in the elucidation of the principles of the law of contract. I hope that the discussion will encourage counsel to exercise a discriminating judgment in the use of these materials. So far practising lawyers have not played a prominent part in stimulating the advances that have taken place. More often than not, imaginative ideas have emanated from the Bench rather than from the Bar. Some counsel regard what is to be found in the cases - especially the Australian and English cases - as the beginning and the end of legal thinking. Of course the American and the English lawyer has greater published resources on which to draw. For example, we do not have a *Restatement of Contracts* or, for that matter, on any other topic. In one sense it is unfortunate that, with only six State jurisdictions and with the unifying influence of the High Court as a general court of appeal, there is not such a pressing need here for a *Restatement* as there is in the United States.

It is not surprising that several articles deal with estoppel. The doctrine of estoppel, no longer odious except perhaps to some elements in the practising profession, has undergone rapid development in recent decisions of the High Court. As some authors point out, these decisions have brought an underlying unity to the various forms of estoppel. Given that unity, one might expect to see in the future more attention directed to examination of the remedy which is appropriate to the particular case.

Good faith has not fared as prominently as estoppel. In this respect the common law in the United States has drawn more heavily on good faith than the common law in Australia and the United Kingdom. Professor Finn makes the valuable point that good faith is a concept that has taken root in other systems.[1] One might be forgiven for thinking that the quality

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1 *Cf.*H.K.Lücke, "Good Faith and Contractual Performance" in P.D.Finn (ed.) *Essays on Contract* (1987), 155.

of Australian commercial life could only profit from an infusion of good faith. No doubt that notion would be opposed by those who believe that commercial men, and presumably women, should be encouraged to be 'robust'. Just what the term 'robust' means in this context is not altogether clear to me. The word is apt to cover a multitude of sins.

The 'no contract' problem to which Dr Carter directs our attention remains to be explored in a systematic way by the courts. The rules governing offer and acceptance tend to compound rather than resolve the problem. Unquestionably estoppel and restitution have a part to play. But the problem lies in an area of law where the intentions and the understandings of the parties find little reflection in the established principles. We would benefit from a set of empirical studies designed to show how parties react in typical 'no contract' situations. Then it would be possible to formulate rules which address the problem in a systematic way.

Mr Kincaid, who seems not to be overly enthusiastic about the decision in *Trident General Insurance Co. Ltd* v. *McNiece Bros Pty Ltd,*[2] discusses the privity question. Of all the topics considered by the authors, the privity question has possibly the best claim to depend on pure contract doctrine. However, as appears from the judgments in *Trident* and Mr Kincaid's article, any examination of privity and consideration necessarily involves interaction with estoppel and restitution.

In conclusion, I commend this issue of the Journal. It contains some stimulating discussion of contemporary issues in the law of contract. It will contribute much to the thinking of those who are concerned with fundamental problems and with the articulation of principle.

2 (1988) 165 CLR 107.