Journal of Contract Law (JCL)
Volume 36 Part 1
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Articles

Emeritus Professor Brian Coote, CBE, FRSNZ, Obituary 1

Professor Coote was an inaugural member of the Journal of Contract Law Editorial Board, serving on the board until 2009. Issue 1 of Volume 9 of the Journal was published as a Special Issue to mark Brian's retirement. He died on 15 July 2019, in his 90th year, and Professor Peter Watts has kindly allowed the Journal to reproduce extracts from his eulogy at Brian's funeral on 20 July 2019.

Mitigation and Remoteness in Contract: Policy and Principle
— *Katy Barnett* 5

This paper explores the policy and operation of the doctrine of mitigation in contract law. It assesses how it fits with contract more broadly and other aspects of contract damages (remoteness and date of assessment). The main policy behind mitigation is to incentivise self-help on the part of the party best placed to avoid loss. In practice, the assessment of when it becomes reasonable to mitigate mostly depends upon the subject matter of the contract, and the liquidity of the market. Courts must know what the available market was in order to calculate the relevant counterfactual inquiry. In a highly liquid market for goods, mitigation is presumed in the basic measure of loss for sale of goods, and damages are measured as at the date of breach. However, the situation may be different in at least three situations: first, where a plaintiff is legally or practically 'locked out' of the market; second, where the market is not liquid; and third, where a plaintiff is 'locked in' for reasons other than financial ones. In a fourth situation, where a plaintiff is 'locked in' for financial reasons, the policy aspects are more complex.

'You Leave Me (Almost) No Choice': Duress in Contract and the Tort of Malicious Bargaining
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The expansion of the doctrine of duress to incorporate threatened imposition of economic loss, particularly through lawful acts, has for the most part been justified on the basis of an understanding of duress as the imposition of illegitimate pressure by one party upon another. This understanding of duress, which focuses on the nature of the conduct of the party applying pressure rather than the position in which that pressure places the pressured party, does not, however, explain the particularly contractual remedy of voidability, which has been the invariable product of duress at common law for centuries. This paper advances an understanding of duress that distinguishes considerations of interpersonal wrongdoing from contractual consent understood, in a legal sense, as having been compelled. In doing so, it identifies the tort of malicious bargaining, a form of interpersonal wrongdoing which, it is argued, arises from the harmful application of illegitimate pressure.

Infants' Contracts: Law and Policy in the 18th and 19th Centuries
— *Richard Austen-Baker and Kate Hunter* 46

Under English law, prior to 1970 young people up to the age of 21 lacked the capacity to make binding contracts, subject to certain exceptions. The report of the Latey Committee on the Age of Majority, which had recommended a reduction to age 18, was one-sided and, so far as capacity to make contracts was concerned, offered scant evidence as to the motivations of the existing law. The Committee heard evidence from the Church asserting, with no evidence, that such rules were intended to control young people and were there to protect the interests of others. This article argues, especially from analysis of the relevant case law during the 18th and 19th centuries — the principal period of development of English jurisprudence on minors' contracts — that the law's motivation had in reality been to protect infants from themselves and from adults who sought to prey on their naivety and impulsiveness.

Smart Contracts: a Requiem
— *Eliza Mik* 70

'Smart contracts' are technologies that facilitate the generation and transfer of blockchain-based crypto-assets. The unfortunate labelling of these technologies as 'contracts' has spawned a plethora of legal theories, which are built on unsubstantiated technical claims and terminological misunderstandings, as well as on a general disillusionment with traditional institutions. Concepts such as 'validation' or 'self-enforcement', both of which constitute permanent fixtures of the 'smart contract' narrative, seem to have hijacked common sense with promises of certainty and guaranteed performance to the point where a structured and logical argument is rendered difficult. It is necessary to clarify the meaning of the term and remind those who debate the legal enforceability and validity of 'smart contracts' of the basic principles of contract law. In particular, it is necessary to recall that contract law is indifferent to the manner parties express their agreement.

Book Reviews

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Contract Rules: Decoding English Law
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