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Articles

The Role of Precedent in the Construction and Implication of Terms in Contracts
— *J W Carter, John Eldridge and Elisabeth Peden* 1

This article explores the interaction between the processes by which statements of intention are construed or terms are implied. The vehicle for the exploration is the decision in *Devani v Wells*, where the Supreme Court of the United Kingdom held, surprisingly, that the processes led to the same conclusion in relation to an alleged oral contract to pay commission to an estate agent. ‘Construction’ was used to deduce agreement to an essential term from a conversation during which the parties remained silent on the matter. The same term was then implied on a factual basis. The contention of the article is that the reasoning is unconvincing on both issues. Given the court’s reasoning, it should have concluded that the essential term omitted during the conversation was a term implied in law.

The Continuing Confusion and Uncertainty over the Relevance of Actual Mutual Intention in Contract Interpretation
— *David McLauchlan* 25

This article discusses the relevance and admissibility in a contract interpretation dispute of evidence that the parties, prior to entry into the contract, shared an actual intention as to the meaning of the language that a court is called upon to interpret. It argues that, despite numerous ritual incantations of a rule that such evidence is inadmissible, the reality is that the law is by no means so clear. There are two main reasons for this. The first is that there are several exceptions or qualifications to the rule that can be, and often are, invoked by counsel and the courts to avoid giving a meaning to contractual terms that is inconsistent with the actual mutual intention of the parties. The second is that these exceptions and qualifications are not always recognised and this can lead to either unsatisfactory outcomes or divisions of opinion between judges based on reasoning that is difficult to comprehend. This will be illustrated through an analysis of the judgments of the New South Wales Court of Appeal in *Cherry v Steele-Park*, and the New Zealand Court of Appeal in *Bathurst Resources Ltd v L & M Coal Holdings Ltd*. The author’s conclusion is that where the evidence clearly demonstrates that, as a result of communications between the parties prior to their contract, they reached an agreement or formed a common understanding concerning the meaning of the language in question, there is no sound basis for refusing to give effect to that agreement or understanding as a matter of interpretation.

Unintended Acceptance of Repudiatory Breach and Loss of Bargain Damages
— *Qiao Liu* 49

This article critically examines the proposition that an exercise of a contractual right of termination without reference to a repudiatory breach is, as a matter of legal principle, incapable of constituting an

‘acceptance’ of that breach. Following a close analysis of *Phones 4U Ltd (in administration) v EE Ltd* and related cases, it advocates a broader and more natural understanding of the concept of ‘acceptance’, the Boston Deep Sea principle and the requisite causal linkage between a repudiatory breach and the loss of the bargain. It is submitted that a purely contractual termination is capable of being characterised as an ‘acceptance’ of a repudiatory breach and of giving rise to a claim for loss of bargain damages, provided that proper construction of the termination notice does not preclude such a result and that the terminating party would not have disregarded the repudiatory breach had it been known at the time of the termination.

The Chimera of Restraint of Trade in India
— *Manasi Kumar* 64

The Indian Contract Act 1872 (the ICA) is both an encapsulation of English common law and, in some significant respects, a study in divergence. One such difference is apparent in the realm of restraint of trade, where s 27 of the ICA declared all restraints of trade void. The Indian Supreme Court has limited the proscription of s 27 largely to negative covenants applicable after the termination of the agreement and, in doing so, implicitly adopted the elective theory of termination for employment agreements. However, this is in direct conflict with a parallel line of cases which approve of the automatic theory. This paper argues that, unlike s 27, the theory of termination in the ICA is still rooted in English common law principles and therefore, the conflict should be resolved in favour of the elective theory. Failure to do so threatens the ingenuity of the restraint of trade jurisprudence in India, with its hard-won, albeit meagre, flexibility.

China’s Approach to the Principle of Change
of Circumstances under the New Chinese Civil Code:
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The principle of change of circumstances was officially added into the new Chinese Civil Code after a gradual development in judicial practices over the past 30 years. Article 533 of the Civil Code abandons the unary approach of the CISG that deals with force majeure and change of circumstances collectively, and adopts the binary approach of the PICC which treats them separately. This new provision both keeps the valuable experiences accumulated in judicial practices, such as the recognition of differences between a commercial risk and a change of circumstances, and innovatively requires the parties to renegotiate their contract upon the occurrence of a change of circumstances before the court adapts or terminates the contract. However, there are still ambiguities and gaps awaiting further clarification from the Supreme People’s Court, ideally before the code comes into force in 2021.

Executive Employment Grievances Brought under the Fair
Work Act: A New Challenge to Orthodox Contract Law?
— *Joellen Riley Munton* 105

A provision in the Fair Work Act 2009 (Cth) has become a common feature of litigation between senior managerial staff and their employers when executive employment contracts have been terminated. The ‘general protection’ against adverse action taken because an employee has made a complaint or inquiry ‘in relation to his or her employment’ has been used to seek remedies (such as reinstatement

and penalties) which would be remarkable if pursued for a breach of the employment contract itself. A number of recent cases demonstrate the potency of this statutory provision to disrupt those orthodox principles of employment contract law that we might otherwise have assumed must apply in the case of high income earners who are excluded from many other protections in the Fair Work Act.

Wavering between a Rock and a Hard Place: The Future of No-waiver Clauses in English Law
— *Harry Sanderson* 122

A recent decision of the United Kingdom Supreme Court held that compliance with form requirements for contractual modification is mandatory, and that non-compliant agreements are ineffective. This article looks beyond contractual modification and posits that the decision has implications for the law of waiver. It argues that the rule established by the Supreme Court requires that form requirements for waiver must be strictly enforced, a reversal of the current position. It contends that such a situation is undesirable, but nonetheless preferable to a situation in which 'no oral modification' clauses are strictly enforced, but 'no-waiver' clauses are not.

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