

BOOK REVIEW

“CONTRACT LAW IN IRELAND” (5th Ed.)

Robert Clarke

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Contractual situations are not confined to the realms of commercial and conveyancing. They are a feature of everyday life. The existence or non-existence of a contract has serious consequences. Therefore, the principles and rules to determine whether a contract has concluded, on what terms if a binding contract has been entered into and the remedies available to those injured by a breach of a contract are of paramount importance. A reader of a publication on contract law should clearly understand these principles on completion of his study.

This is the fifth edition of Robert Clarke’s publication. As the author points out, the law has moved on since the last edition. It has changed substantially, as a result of case law and legislative developments. The book deals comprehensively with the effect electronic commerce and consumer protection has on the law of contract, providing a detailed analysis of the relevant legislation. The author fully explores recent important Irish and English case law for explaining and illustrating the relevant principles of contract law and the courts’ approach to the application and development of these principles. Moreover, he carries out a comparative study with relevant Canadian, Australian and New Zealand cases.

The author has taken the opportunity of a new edition to incorporate a substantial body of new material and to rewrite and expand several chapters. The book is divided into nine parts/twenty chapters.

The first part focuses primarily on the essential elements of a contract: the Rules of Offer and Acceptance, The Doctrine of

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Consideration, Intention to Create Legal Relation and the Formal and Evidentiary Requirements. The use of hypothetical situations as a means of explaining the basic concepts, such as an invitation to treat, counter-offers, silence rule and the doctrine of consideration, are particularly helpful. The leading English cases are extensively analysed, clearly setting out the governing principals and their relevance and application in Irish contract law. Furthermore, the author has incorporated numerous recent cases and has explored the development of the fundamentals; for example, the Supreme Court's decision on promissory estoppel in *Daly v Minister for the Marine*,¹ forms of forbearance in *O'Keefe v Ryanair Holdings Ltd*² and the importance of adopting a pragmatic approach as explored in *Williams v Roffey Brothers & Nicholls (Contractors) Ltd*.³ The commentary on illusory and uncertain contract terms is extensive and not often dealt with in other text books on the subject. The analysis of unilateral contracts, the underlying reasoning of postal rule and the discussion on electronic contracts/relevant legislation, gazumping and letters of comfort are excellent. The latter is very useful for commercial and conveyancing practitioners.

The final chapter in Part 1 deals with the formal and evidentiary requirements of a contract. It is clear and concise, albeit incongruous with the other chapters dealing with the fundamental concepts. The author discusses the equitable means of enforcing the contract in this context, although an entire chapter (Part 4) is set aside specifically for equitable intervention in the law of contract. There is a critical analysis of the antiquated nature of the *Statute of Frauds* in light of recent case law and its repeal in many jurisdictions.

Part 2 deals with the construction of the contract, and again, the author uses many practical examples to illustrate a point, making a sometimes complex and tedious area understandable to both

¹ [2001] 3 IR 513. This case concerned a dispute between the owner of a fishing vessel and the Minister for Marine in respect of the entitlement of the plaintiff to sell the vessel and avail of a marine fisheries scheme. The plaintiff failed in his claim of promissory estoppel as no acts of reliance were shown by the plaintiff demonstrating a return by the Irish courts to the orthodox requirements of the doctrine.

² [2003] 1 ILRM 14. This case identified the surrender by the plaintiff of her anonymity and privacy and her participation in a number of press and media events as the "Ryanair One Millionth Passenger" as a new form of forbearance consideration.

³ [1990] 1 All ER 512. This English Court of Appeal decision found that a subcontractor provided consideration (i.e. a real benefit to the promisee) by promising to complete works without interruption despite the fact that he was only carrying out what he was bound to do under the construction contract. This decision effectively undermines the bargain theory but only in cases where the contract relates to rendering services and is not applied to part payment of a liquidated debt.

students and practitioners. Both the parol evidence rule and the implied terms in a contract are very well structured, clear and concise. The chapter on implied terms deals with the development of a good faith obligation on the parties to a contract. While this is an isolated plea in Ireland, it is becoming more prevalent in England and other commonwealth countries. The officious bystander and business efficacy test are explained using recent Irish case law. The chapter on exemption clauses sets out clearly the rules governing this concept and is well illustrated with the foundation “ticket cases” and relevant recent cases. With regard to the construction of the exemption clause, the author focuses on the judicial approach of recognising the commercial reality of the situation. The doctrine of fundamental breach of contract is critically discussed at length and he analyses the current judicial views in Ireland.

Consumer protection is usefully categorised into criminal law and civil remedies with sections set aside for miscellaneous statutory measures and EU law which concisely sets out the various relevant directives. The discussion on what is considered “fair and reasonable” in contracting out of the Sale of Goods and Supply of Services Act 1980 is comprehensive.

The author uses Professor Corbin’s dichotomy – covenants/promises – to distinguish between different contractual terms and critically looks at the *Hong Kong Fir*⁴ case in Chapter 9.

The invalidity of the contract is dealt with in Part 3. Students and those who teach contract law often have difficulty with the threefold classification of the types of mistake – “common,” “mutual” and “unilateral” – judges often use the terms interchangeably. The author proposes a novel approach which may make this area easier to grasp. It involves examining mistake by looking to what the courts do by firstly examining the case law to determine whether a mistake is operative either at common law or in equity and then considering the rules relating to the various remedies.

The causes of action and remedies relevant to misrepresentation are neatly set out in Chapter 11. Section 46 of the

⁴ *Hong Kong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd.* [1962] 2 QB 26

Sale of Goods and Supply of Services Act 1980, which provides that any exclusion clause limiting or exempting liability by reason of misrepresentation must be fair and reasonable, is examined and readers are cross referenced to Chapter 8. There is a comprehensive analysis of the concept of *Uberrima Fides* in the context of insurance contracts in Ireland with a focus on recent English cases such as *Spice Girls Ltd. v Aprilia World Service B.V.*⁵ The plea of duress is explained by way of interesting and apt cases.

The author dedicates the next part to equitable intervention (undue influence and unconscionable bargains), which will prove useful for both academics and practitioners.

Part 5 is termed Public Policy and deals with illegal and void contracts. For the purposes of classifying invalid cases, the author concurs with the general categorisation – cases where the whole contract is invalid, i.e., illegal contracts at common law and statutory illegality (Chapter 14) and cases where the contract is void, but can be severed to enforce a part of the transaction (Chapter 15). The illegal contracts are clearly categorised and the discussion on the antiquated view of the Irish judiciary on contracts prejudicial to the administration of justice is interesting. There is a separate paragraph set aside for Gaming and Wagering Contracts. The consequences of both common law and statutory illegality are surmised and the judicial attitudes are examined with the author setting out very clearly the *in pari delicto* and *ex turpi causa* rule, the exceptions thereto and, where appropriate, limited remedies. The author advises that a more flexible approach may be considered by the Irish judiciary in light of the UK approach.

The chapter dealing with void contracts is categorised as follows: agreements to oust the jurisdiction of the courts, contracts which subvert the sanctity of marriage and contracts in restraint of trade. Although there is no separate chapter on restraint of trade, the doctrine is dealt with adequately with the author examining the impact of the Competition Act 2002 on the doctrine and the expansion of the doctrine itself. Recent Irish and non-Irish cases such as *Dranez Alstalt v Hayek*⁶ and *Days Medical Aids Ltd. v Pihsang*

⁵ [2002] EWCA Civ. 15

⁶ [2003] FSR 561

*Machinery Manufacturing*⁷ work well for illustration purposes. There is particular emphasis on the ever more prevalent Cohabitation Agreements in the context of contracts which subvert the sanctity of marriage. The principles governing the severance of void provisions explore the wider powers of American courts which are relevant in light of the powers granted to the Competition Authority pursuant to the 2002 Act.

There is a comprehensive analysis of the Irish Law Reform Commission's "*Report on Minor Contracts*" in Chapter 16 – Contractual Capacity. However, the topic seems misplaced and would be more appropriately dealt with earlier in the book.

The author, in Chapter 17, confirms that the Doctrine of Privity remains in force in Ireland, but is due for reform in light of recent reforms in England, Wales and Northern Ireland. It is pointed out that the English Law Reform Commission recommends that the law should be amended to give effect to the intention of the parties, i.e., where it is intended that a third party would enforce a contract term directly.

The use of hypothetical examples is again very important in dealing with Discharge. The section dealing with frustration is well structured and the leading cases are described and assessed comprehensively.

The introduction to remedies in general sets the scene for the remedy of damages. The measure of compensation and the classification of same are dealt with. The principles established (with the exceptions thereto) in *Hadley v Baxendale*⁸ are clearly explained. There are a number of miscellaneous topics dealt with in this chapter – contracts for sale of land, taxation and interest penalty clause for completion purposes. Restitutionary relief is dealt with as a separate topic.

The author does not simply take the law at face value and often adopts a more analytical stance highlighting the underlying policy of the present law and any future developments. For example, he points out the uncertainties and tensions which result from the decisions in *Foakes v Beer*⁹ (in the context of promissory estoppel),

⁷ [2004] 1 All ER (Comm) 991

⁸ [1854] 9 Ex. 341

⁹ [1884] 9 App. Cas. 605

*Kelly v Park Hall Schools*¹⁰ and *Casey v Irish Intercontinental Bank*¹¹ (in the use of the phrase "subject to contract"), *Hedley Byrne*¹² and *Cody v Connolly*¹³ (in the context of misrepresentation) and the criticisms of the Doctrine of Part Performance, Consideration, the Doctrine of Unconscionable Bargains and the Parol Evidence Rule. Wherever possible, the author uses relevant Irish case law to illustrate a point and throughout the text offers a comparison with other common law jurisdictions. Emphasis is placed on the reforms of various elements of contract law.

One criticism of the text from a student of contract law's perspective would be the lack of clear definitions, bullet points and chapter summaries despite the readable nature of the text. Also, parts of certain chapters, specifically the first part dealing with the formation of the contract, are lacking in subheadings and, at times, the insertion of the headings is somewhat arbitrary. Although there is a comprehensive index, it would prove useful to have a more detailed table of contents for ease of reference. Furthermore, although there are numerous footnotes, what might prove frustrating for the academic researcher or teacher is that there are very few references made to articles or case notes from academic journals.

Two major strengths of the book are the use of practical examples to explain a particular concept, which are invaluable particularly to students, and the lucidly written introductions to each chapter, which set the scene for the remainder of the chapter. The book provides a very comprehensive and practical analysis of the law of contract in Ireland and is an authoritative guide to all legal aspects of a contract. It is a useful source of information and guidance for students, practitioners and academics.

¹⁰ [1979] IR 340

¹¹ [1979] IR 364

¹² *Hedley Byrne v Heller* [1964] AC 465

¹³ [1940] Ir. Jur. Rep. 49