DOUG TENNANT



### **Doug Tennant**

This book was originally published as a monograph in the International Encyclopaedia of Laws/Contract Law.

General Editor: Roger Blanpain Associate General Editor: Michele Colucci Volume Editor: Jacques Herbots



Published by: Kluwer Law International PO Box 316 2400 AH Alphen aan den Rijn The Netherlands Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by: Turpin Distribution Services Ltd. Stratton Business Park Pegasus Drive, Biggleswade Bedfordshire SG18 8TQ United Kingdom Email: kluwerlaw@turpin-distribution.com

DISCLAIMER: The material in this volume is in the nature of general comment only. It is not offered as advice on any particular matter and should not be taken as such. The editor and the contributing authors expressly disclaim all liability to any person with regard to anything done or omitted to be done, and with respect to the consequences of anything done or omitted to be done wholly or partly in reliance upon the whole or any part of the contents of this volume. No reader should act or refrain from acting on the basis of any matter contained in this volume without first obtaining professional advice regarding the particular facts and circumstances at issue. Any and all opinions expressed herein are those of the particular author and are not necessarily those of the editor or publisher of this volume.

Printed on acid-free paper.

ISBN 978-90-411-4034-0

This title is available on www.kluwerlawonline.com

© 2012, Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Email: permissions@kluwerlaw.com

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

### The Author



Doug Tennant is currently lecturing at the School of Law at the University of Waikato, New Zealand. His areas of teaching include, Company Law, Equity, Torts and Immigration and Refugee Law.

He worked in Papua New Guinea from 1984–1992 and from 1997–2002. During the first period he worked as a volunteer with the Catholic Church in the Court and prison system in the Highlands. During the second period he was a lecturer at the School of Law, University of Papua New Guinea. His areas of teaching were: Contract Law, Civil Procedure and Remedies and International Human Rights. The teaching of Contract Law for five years has provided the foundations for this monograph on Contract Law in Papua New Guinea.

The Author	3	
List of Abbreviations		
Preface	15	
General Introduction	17	
Chapter 1. The Legal System in Papua New Guinea	17	
<ul> <li>§1. Introduction</li> <li>§2. National Goals and Directive Principles</li> <li>§3. The Court System of Papua New Guinea</li> <li>§4. The Hierarchy of Laws in Papua New Guinea</li> <li>§5. The Underlying Law</li> <li>§6. Three Significant Constitutional Provisions with Regards to the Work of the Courts</li> <li>§7. Summary</li> </ul>	17 17 18 19 19 22 24	
Introduction	25	
Chapter 1. Contract Law in Papua New Guinea	25	
§8. The Adoption of Common Law Principles of Contract §9. A Definition of a Contract §10. The Essential Ingredients of a Contract §11. The Presence of the Essential Ingredients of a Contract in Traditional Papua New Guinean Exchanges	25 25 26	
§12. RECENT DEVELOPMENTS §13. THE PAPUA NEW GUINEAN SITUATION	29 29	
Selected Bibliography	31	
Table of cases	33	
Part I. Formation of Contracts	41	

Chapter 1. Intention to Enter into Legal Relations	41
\$14. GENERAL \$15. COMMERCIAL AGREEMENTS \$16. GOVERNMENTAL UNDERTAKINGS \$17. DOMESTIC AGREEMENTS \$18. SOME DOMESTIC AGREEMENTS CAN BE LEGALLY BINDING \$19. THE SITUATION IN PAPUA NEW GUINEA	41 42 45 46 48 49
Chapter 2. Offer	51
\$20. General \$21. An Offer to the World \$22. An Offer to a Specific Person \$23. An Offer to Treat \$24. The Legal Position Relating to Auctions \$25. Can an Offer be Revoked \$26. How Long can an Offer Remain Open for \$27. Summary	51 52 53 55 55 57
Chapter 3. Acceptance	58
§28. ACCEPTANCE MUST BE UPON THE EXACT TERMS AND CONDITIONS THAT WERE CONTAINED IN THE OFFER	58
§29. The Acceptance must be Communicated to the Offeror in a Manner which is Understood  I. Brogden v. Metropolitian Railway Limited II. Carlill v. Carbolic Smoke Ball Co	59 59
§30. ACCEPTANCE BY SILENCE	60
§31. THE OFFEREE MUST NOTIFY THE OFFEROR OF HIS/HER ACCEPTANCE OF THE OFFER IN THE EXACT MANNER THAT THE OFFEROR REQUIRES §32. THE OFFEROR AND OFFEREE MUST BE OF ONE MIND WITH REGARDS TO THE TERMS AND CONDITIONS OF THE CONTRACT WHICH THEY ARE	62
AGREEING TO §33. THE ACCEPTANCE IS CONDITIONAL UPON THE TERMS AND CONDITIONS	62
REMAINING THE SAME	62
§34. ACCEPTANCE BY POST  I. Tonolei Development Corporation v. Lucas Waka	63 64
II. Holwell Securities v. Hughes	64
§35. Acceptance by Phone and Telegraph	65
§36. Summary	66
Chapter 4. Consensus Ad Idem	68
§37. Introduction	68
§38. Consensus Ad Idem – General	68

	I. Pius Itol v. Ronald Sakuma and Ngetuberrai Antol II. Brikul Ngiruchelbad v. Moses Ngirasewei	68 69
839	WHEN THE COURTS MAINTAIN THAT CONSENSUS AD IDEM IS NOT AN	09
3-27.	ISSUE	70
	I. Tamplin v. James	71
	II. Smith v. Hughes	72
§40.	WHEN ONE OF THE PARTIES KNOWS THAT THE OTHER HAS MADE A	
	MISTAKE AND REMAINS SILENT ABOUT THE FACT	73
§41.	MISTAKEN IDENTITY	74
	SUMMARY	77
Cha	pter 5. Consideration	79
§43.	THE ACTUAL DOCTRINE	79
§44.	WHAT IS CONSIDERATION	79
§45.	WHAT THE COURT HAS SAID AMOUNTS TO CONSIDERATION	80
	I. Carlill v. Carbolic Smoke Ball Co	80
	II. Dunton v. Dunton	80
äiz	III. Chappell v. Nestle	81
10	EXECUTORY AND EXECUTED CONSIDERATION	81
	THE ADEQUACY OF CONSIDERATION	82
	MUST THE CONSIDERATION BE FULLY SET OUT IN AN AGREEMENT?	83
	DOES A BANK CHEQUE AMOUNT TO CONSIDERATION?	84 84
	THE ISSUE OF PAST CONSIDERATION CAN THE PERFORMANCE OF AN EXISTING OBLIGATION OR DUTY	04
851.	AMOUNT TO GOOD CONSIDERATION	85
	I. Ward v. Byham	85
	II. Williams v. Williams	86
852	CAN CONSIDERATION BE FOUND IN A GOVERNMENT SUBSIDY	87
	CONSIDERATION IN TRADITIONAL PAPUA NEW GUINEA EXCHANGES	88
0.00	I. Adoption in the Eastern Highlands	88
	II. Ceremonial Shaving of the First Born Son's Head in the Sandaun	
	Province	89
§54.	THE DECISION IN FOAKES V. BEER	90
§55.	THE PRINCIPLE OF EQUITABLE ESTOPPEL	90
§56.	THE EXTENSION OF THE PRINCIPLE	93
	I. The Failure to Enforce Strict Legal Rights	94
§57.	THE EXTENSION OF THE PRINCIPLE TO VOLUNTARY SITUATIONS IN	
	CERTAIN CIRCUMSTANCES	100
	IS THE WALTON'S PRINCIPLE GOOD LAW FOR PAPUA NEW GUINEA	104
§59.	SUMMARY	105
Part	II. Contents of a Substantive Validity	109
Cha	pter 1. Contractual Capacity	109

§61. §62. §63.	CONTRACTUAL CAPACITY OF MINORS THE LEGAL EFFECT OF A MINOR ENTERING INTO A CONTRACT THE CONTRACTUAL POSITION OF A PERSON WITH AN UNSOUND MIND PERSONS WHO ARE DRUNK WHEN ENTERING INTO A CONTRACT SUMMARY	109 110 111 112 113
Cha	pter 2. Misrepresentation	114
§66. §67.	GENERAL COMMENT FOR CHAPTERS 2, 3 AND 4 MISREPRESENTATION. WHAT EXACTLY IS IT HOW IS MISREPRESENTATION DETERMINED BY THE COURTS INNOCENT MISREPRESENTATION I. Leaf v. International Galleries II. Whittington v. Seale-Hayne	114 114 115 116 116 116
§69.	FRAUDULENT MISREPRESENTATION I. Edgington v. Fitzmaurice II. Alati v. Krugger III. Fletcher v. James	117 118 118 119
	NEGLIGENT MISREPRESENTATION SUMMARY	121 123
Cha	pter 3. Unconscionable Contracts	126
	THE CONSTITUTION OF PAPUA NEW GUINEA AND EQUALITY THE BASIS OF UNCONSCIONABLE CONTRACTS IN COMMON LAW AND	126
§74.	EQUITY THE INTRODUCTION OF THE FAIRNESS OF TRANSACTIONS ACT 1993 I. The Scope of the Transaction II. The Fact that there does not Need to be Consideration in the	127 133 133
	Transaction  III. The Definition of a Party to a Transaction	134 134
875.	THE POWER THAT THE LEGISLATION GIVES TO THE COURT TO RECTIFY	
§76.	TRANSACTIONS THE POWER OF THE COURT TO RECTIFY AN UNFAIR TRANSACTION THE INFLUENCE THAT THE FAIRNESS OF TRANSACTIONS ACT 1993 HAS	135 137
	ON OTHER PIECES OF LEGISLATION	138 138
870.	SOME GENERAL COMMENTS ABOUT THE LEGISLATION I. The Limitation Period of Three Years II. The Court under the Legislation Refers to the National Court	139 139
§80.	AN EXAMPLE THE FORESTRY AGREEMENTS IS THE PRINCIPLE OF NON EST FACTUM STILL REQUIRED IN PAPUA NEW	141 143
	GUINEA WITH THE FAIRNESS OF TRANSACTIONS ACT 1993 SUMMARY	148 149

Chapter 4. Illegal Contracts	152			
§83. Introduction	152			
§84. CONTRACTS WHICH ARE ILLEGAL IN ACCORDANCE WITH STATUTE	152			
I. Illegal Contracts which have been Upheld by the Courts	153			
II. Illegal Contracts which the Courts have not been Upheld	155			
III. The Confusion Clarified	160			
IV. The Effect of Barclay	161			
§85. CONTRACTS WHICH ARE CONTRARY TO PUBLIC POLICY	162			
I. Contracts which Oust the Jurisdiction of the Court	163 165			
<ul><li>A. Public Policy</li><li>B. The Effect of One Clause on the Other Clauses</li></ul>	166			
\$86. RESTRAINT OF TRADE CLAUSES	166			
§87. GOVERNMENT CONTRACTS AND THE NATIONAL GOALS AND DIRECTIVE	100			
PRINCIPLES	170			
§88. SUMMARY	172			
Part III. Contents of a Contract	177			
Part III. Contents of a Contract	17.7			
Chapter 1. The Parole Evidence Rule	177			
§89. ORAL CONTRACTS AND CONTRACTS IN WRITING	177			
§90. THE PAROLE EVIDENCE RULE 1				
§91. CASE LAW AND THE PAROLE EVIDENCE RULE				
I. When Some of the Contract is Contained in Writing and Some is				
Oral	182			
A. Conditions	183			
B. Warranties and Representations	184 185			
C. The Relevant Case Law a. Heilbut, Symons v. Buckleton	185			
b. Oscar Chess Limited v. Williams	186			
c. Bentley (Productions) Ltd v. Harold Smith (Motors) Ltd	187			
d. Hopkins v. Tanqueray	189			
e. Schawel v. Reade	190			
D. The Framework which Needs to be Followed in Papua				
New Guinea	191			
E. Condition or Warranty	191			
§92. COLLATERAL CONTRACTS	192			
I. Relevant Case Law	193			
a. Turner v. Forwood and Another	193			
b. Pacific Foam Pty Limited v. Zurich Pacific Insurance Pty	104			
Limited 503 Average Tennes	194 195			
§93. IMPLIED TERMS	195			
I. Custom II. Statutory Guidance	190			
III. Judicial Intervention	199			
III. Judicial Intervention				

§94. WRITTEN CONTRACTS WHICH ARE VAGUE OR INDEFINITE §95. ESTOPPEL §96. SUMMARY	201 204 204
Chapter 2. Exclusion Clauses and Fundamental Breach	207
§97. EXCLUSION CLAUSES GENERAL §98. CONTRACTS CONTAINING AN EXCLUSION CLAUSE WHICH DON'T	207
REQUIRE A WRITTEN CONTRACT	208
§99. CONTRA PREFERENTUM RULE	209
§100. Fundamental Breach §101. The Challenge to the Principle of Fundamental Breach	210 212
§101. THE CHALLENGE TO THE PRINCIPLE OF FUNDAMENTAL BREACH	214
Chapter 3. Privity	217
§103. THE DOCTRINE	217
§104. Privity and Agency	218
§105. CONTRACTS ENTERED INTO FOR THE BENEFIT OF A THIRD PARTY	220
WHO DID NOT PROVIDE CONSIDERATION	220
I. Beswick v. Beswick II. Jackson's v. Horizon Holidays	220 220
§106. Exceptions to Privity – General Comments	221
§107. ASSIGNMENT OF CONTRACTUAL RIGHTS	222
§108. ASSIGNMENT OF CONTRACTUAL OBLIGATIONS	224
§109. Exception Three – The Beneficiary of a Trust	225
§110. EXCEPTION FOUR – THIRD PARTIES TO A CONTRACT AND THEIR COVER FROM EXEMPTION CLAUSES ENTERED INTO BY THE	
PRINCIPLE PARTY TO THE CONTRACT	227
§111. EXCEPTION FIVE – PARTIES AFFECTED BY THE CONTRACT	229
§112. Summary	231
Part IV. Termination of Contracts	235
Chapter 1. Termination of Contracts	235
§113. General	235
§114. SUBSTANTIAL AND PART PERFORMANCE	235
I. Substantial Performance	235
II. Part Performance	236
III. Divisible Contracts	236
§115. VARIATION OF THE TERMS AND CONDITIONS OF THE CONTRACT	236 236
I. Accord and Satisfaction II. Promissory Estoppel	237
\$116. Contractual Breach	237
I Repudiation	237

10

II. Fundamental Breach §117. THE DOCTRINE OF FRUSTRATION	239 240
I. The Eugenia	24
II. Davis Contractors v. Fareham Urban District Council	24:
III. W.J. Tatem Ltd v. Gamboa	243
§118. FORCE MAJEURE	244
§119. Summary	24:
Chapter 2. Remedies in Contract	24
§120. General	247
§121. EQUITABLE REMEDIES	247
I. Specific Performance	24
A. Daba Hisiuna v. Turner and Davey	248
B. The Case of Taudevin v. Thesira & Others	248
II. Injunction	249
A. Mauga Logging v. South Pacific Oil Palm	250
III. The Doctrine of Part Performance	25
IV. Rescission	253
V. Quantum Meruit	254
§122. DAMAGES FOR BREACH OF A CONTRACT	258
§123. PRE-ESTIMATION OF DAMAGES	267
§124. DAMAGES FOR NON ECONOMIC LOSS	268
§125. MITIGATION	269
§126. Interest §127. Taxation	273 274
§128. SUMMARY	278
Part V Specific Contracts	281
Chapter 1. Supplementary Sale of Goods Act	281
§129. SALE OF GOODS INTRODUCTION	281
§130. THE LEGAL PASSING OF THE GOODS FROM THE SELLER TO	
THE BUYER	282
§131. PERFORMANCE OF THE CONTRACT	283
§132. ISSUES RELATING TO CONDITIONS AND WARRANTY	283
§133. The Carriage Leading to Delivery	284
§134. RIGHTS OF SELLER	284
§135. RIGHTS OF UNPAID SELLERS	284
§136. ACTIONS FOR BREACH OF CONTRACT	285
I. The Seller	285
II. The Buyer	286
Chapter 2. Bailment	286
§137. BAILMENT – GENERAL	286

§138. HIRE PURCHASE – A SPECIAL TYPE OF BAILMENT	288		
§139. DIFFICULTIES WITH THE COMPLETION OF THE AGREEMENT	289		
§140. SEQUESTRATION	289		
Chapter 3. State Leases and Government Contracts	291		
§141. State Leases	291		
§142. APPROVAL OF STATE LEASES	291		
§143. ACCEPTANCE OF STATE LEASES	291		
§144. Obligations and Entitlements under State Leases §145. Different Types of Governmental Leases §146. Mission Leases			
		§147. GOVERNMENT CONTRACTS	292
		Chapter 4. Gaming Contracts	294
Chapter 5. Agency	295		
Chapter 6. Quasi Contracts	296		
Index	297		

### **Doug Tennant**

This book was originally published as a monograph in the International Encyclopaedia of Laws/Contract Law.

General Editor: Roger Blanpain Associate General Editor: Michele Colucci Volume Editor: Jacques Herbots



## The Author



Doug Tennant is currently lecturing at the School of Law at the University of Waikato, New Zealand. His areas of teaching include, Company Law, Equity, Torts and Immigration and Refugee Law.

He worked in Papua New Guinea from 1984–1992 and from 1997–2002. During the first period he worked as a volunteer with the Catholic Church in the Court and prison system in the Highlands. During the second period he was a lecturer at the School of Law, University of Papua New Guinea. His areas of teaching were: Contract Law, Civil Procedure and Remedies and International Human Rights. The teaching of Contract Law for five years has provided the foundations for this monograph on Contract Law in Papua New Guinea.

### The Author