

Butterworths Common Law Series

The Law of Contract

Fourth Edition

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Series Preface

The common law is justifiably seen as a jewel in the crown of English law. The common law has travelled far afield to many other countries where it has been adopted and developed by the local courts. No longer the sole preserve of the judges in London (or Edinburgh and Cardiff), its durability and richness has been due in no small way to the diversity of approach that exists between the common law countries throughout the world. Many of the great judges in England, such as Coke, Mansfield, Blackburn, Atkin, Devlin, Reid and Denning, and those from overseas such as Oliver Wendell Holmes, Benjamin Cardozo and Owen Dixon, have been masters of the common law. As we enter the new Millennium, the common law continues to influence the development of law elsewhere. It will remain a major export, but now also an import, of this country.

Butterworths Common Law Series conceives of the common law in broad terms, providing analyses of the principles informing the frameworks of the law derived from judicial decisions and legislation. The *Series* seeks to provide authoritative accounts of the common law for legal practitioners, judges and academics. While providing a clear and authoritative exposition of the existing law, the *Series* also aims to identify and examine potential developments in the common law drawing on important and significant jurisprudence from other common law jurisdictions. Judges have increasingly looked to academic works for guidance on the accepted view of the law but also when contemplating a reformulation or change of direction in the law. The *Series* may, it is hoped, provide some assistance such that the law is less likely to be left undeveloped ‘marching . . . in the rear limping a little’, to quote a famous judicial aphorism (*Mount Isa Mines v Pusey* (1970) per Windeyer J).

Andrew Grubb

Foreword

by the Right Honourable The Lord Steyn, Lord of Appeal in Ordinary

The law of contract is the core subject in the law of obligations. Upon its boundaries depend the spaces left for the law of tort and in the law of restitution. Historical and cultural factors in different countries dictate the boundaries between these allied subjects. Most legal systems, common law and civilian, to which we look for guidance in a difficult case assign to the law of contract a greater role than English law at present accommodates. In England the law of contract has been restricted by the requirements of privity of contract and consideration. Lord Goff of Chieveley, a master of the common law, observed a few years ago in *The Pioneer Container* [1994] 2 AC 324 at 335, that it is an open question how long those principles can be maintained. If this assessment is correct, as I believe it to be, it follows that the very foundations of our contract law may be re-examined by the courts in the next few years. This ought to cause no apprehension. It is healthy to re-examine from time to time whether the existing law fulfils the only purpose for which it exists, namely the needs of contemporary society. And the structural soundness of our law of contract is of great importance.

This work is principally aimed at practitioners. Practitioners require in the first place a map of the vast and complex subject. This book provides a most detailed and careful map of the contours of our contract law. But while the orthodox view of the law is carefully stated and explained, I am glad to see that throughout the work problems are placed in context and tensions between competing considerations are carefully addressed. That is a most valuable part of this book. After all, as adult lawyers we must address the problem that sometimes in contract cases the requirements of certainty and efficiency may be countered by the requirements of moral legitimacy and individualised justice. How the courts should approach those conflicts, notably in appellate courts, is a subject of supreme importance for those appearing in the courts.

If I had to single out any part of this book for special praise, it is the substantial Chapter 1, General Considerations. It examines the grand themes of our contract law—freedom of contract, reasonableness, good faith or the reasonable expectations of parties, and so forth—in an impressive style. Nothing

Foreword

quite like it has ever been published in English law. It abounds in meaningful insights. It will be required reading for practitioners in the law of contract. And it is wise for practitioners to bear in mind that the higher you go in the legal system the more important it is to concentrate on the footholds of secure theoretical foundations.

I regard the publication of this work as a major event in the development of our contract law. I will make constant use of it. I unreservedly commend it to practitioners, judges, academic lawyers and students.

Johan Steyn

7 July 1999

Preface to the fourth edition

Keeping a book of this kind up to date continues to be like painting the Forth bridge – a never ending task though fortunately more interesting to those doing it. Although it has been possible to update the electronic versions of the text since 2007, it now seems time to produce a new print edition.

There have been a number of important decisions of the House of Lords in *Datec Electronic Holdings v United Parcels Service* [2007] UKHL 23; *Stack v Dowden* [2007] UKHL 17; *Lonsdale v Howard & Hallam* [2007] UKHL 32; *Riverside Housing Association v White* [2007] UKHL 20; *The Golden Victory* [2007] UKHL 12; *Sempra Metals v IRC* [2007] UKHL 34; *Chartbrook v Persimmon* [2009] UKHL 38; *The Achilleas* [2008] UKHL 48; *Stone & Rolls v Moore Stephens* [2009] UKHL 39; *Fisher v Brooker* [2009] UKHL 41; of the new Supreme Court in *Office of Fair Trading v Abbey National* [2009] UKSC 6; *RTS v Muller* [2010] UKSC 14; and of the Privy Council in *MacLeod v MacLeod* [2008] UKPC 64; *AG of Belize v Belize Telecom* [2009] UKPC 10.

Probably the changes in relation to the description of the process of Interpretation of Contracts and the Calculation of Damages for Breach are the greatest. There have of course been many other cases in lower courts. We have tried to take account of developments up to early 2010.

The editors are very grateful for the help provided by Nigel Voak, Evelyn Reid and Judith Anderson.

Michael Furmston

September 2010

Preface to the third edition

This third edition appears less than four years after the appearance of the second edition and thus continues the policy of keeping up to date by new editions rather than by supplements. The publishers and my fellow editors have shown great drive and enthusiasm in making this possible.

His coauthors were delighted when Andrew Phang was appointed to the High Court in Singapore and soon afterwards to the Court of Appeal but at the same time we miss him. I have taken over his responsibility for chapter 5 except for the treatment of competition law which is now in the safe hands of Brenda Sufrin.

Some of the developments noted in the preface to the second edition such as the invasion of traditional contract law by consideration of human rights law and the increasing importance of globalisation in the development of contract law have been marked by the decision of the House of Lords in *Wilson v Secretary of State for Trade and Industry* and the appearance of the second edition of the Unidroit Principles for international commercial contracts. There have been important decisions of the House of Lords also in *Dunnachie v Kingston upon Hull*; *Eastwood v Magnox*; *Jackson v Royal Bank of Scotland*; *Jindal Iron & Steel v Islamic Solidarity*; *Lagden v O'Connor* and *Shogun Finance v Hudson* and a helpful decision of the Privy Council in *Pratt Contractors v Transit*.

There have of course been many other cases with particular richness in relation to the unfair terms in consumer contracts regulations and commercial agents. We have tried to take account of developments up to the end of October 2006.

Evelyn Reid and Judith Anderson from the publishers have at all times been helpful and encouraging.

Michael Furmston

February 2007

Preface to the second edition

The first edition of this book appeared in 1999. The authors were much encouraged by the friendly reception which it received and it soon became clear that urgent thought should be given to the question of keeping the work up to date. The authors and the publishers agreed that a completely new edition was a better solution than updating by means of supplements and we therefore present this second edition almost exactly four years after the appearance of the first.

Contract law lives in an age of major change. The Contract (Rights of Third Parties) Act 1999 has now come into force though its precise effect remains a matter for speculation. It has become clear that serious consideration has to be given to the impact of human rights legislation on contract law and we await with the greatest interest the decision of the House of Lords in the *Wilson* case. Globalisation proceeds apace with the completion of the Principles of European Contract Law and a revised and extended edition of the UNIDROIT Principles for International Commercial Contracts being very close to completion. Both human rights and globalisation have required extensive new consideration in this new edition. The major changes in competition law introduced by the Enterprise Act 2002 required careful consideration. We have made a start on the examination of the impact of electronic commerce on the process of contract formation but it is clear that there will be much more by way of development of this topic in the future. Similarly, the important review of the law of gambling may well require significant changes in a future edition.

There have been a significant number of decisions of the House of Lords of major importance. These include the contrasting views of the process of construction in the particular context of agreements by way of release in *BCCI v Ali*; the first decision of the House of Lords on the Unfair Terms in Consumer Contracts Regulations in *Director General of Fair Trading v First National Bank*; *Royal Bank of Scotland v Etridge (No 2)*; *Hurst v Bryk*; *On Demand Information plc v Michael Gerson Finance plc*; and *Panatown v McAlpine*.

Important decisions have not of course been confined to the House of Lords. Other cases which perhaps deserve mention include *Baird Textiles v Marks &*

Preface to the second edition

Spencer; Carlton Communications v Football League; The Great Peace; Shogun v Hudson; Awwad v Geraghty; Mohammed v Alaga; Carnduff v Rock; and Stocznia Gdanska v Latvian Shipping. There has also been a substantial body of cases on the Commercial Agents Directive.

Modern developments in law reporting, particularly through the use of the internet meant, that we are all in constant danger of being drowned in material. The authors do not claim to have referred to every case which might be found on some database somewhere but they do hope to have covered all significant reported cases which had appeared by the end of the year 2002 and to have taken note of at least some which have appeared in the early part of 2003.

The production of this edition has proceeded in a happy spirit of co-operation to which the good offices of Julian Roskams, Deborah Saunders and Helen Vaux (strictly in alphabetical order) at LexisNexis UK have greatly contributed.

Michael P Furmston

June 2003

Preface to the first edition

This book is the first of a new series to be published by Butterworths to include texts on the major areas of common law such as contract, tort, agency, sales etc. The series is designed to meet the needs of practitioners in modern legal practice.

The classical distinction between student texts and practitioner texts is, like many classical distinctions, very different today from what it was a hundred years ago. Major texts written primarily for the student market are routinely used by practitioners; Lords of Appeal in Ordinary write books of the highest academic distinction; academic lawyers are to be found writing handbooks to guide the practitioner through the complex interactions of the coalface. Nevertheless, the needs of practitioners are not the same as those of students. Practitioners need a text which clearly and accurately states the accepted view but they need more than this. The accepted view will not in all cases last forever. Advocates before appellate courts need material to purpose reformulations of the accepted view which may put their case on the right rather than the wrong side of the line, and from time to time to argue for one of those major leaps forward which are characteristic of the common law at its best.

The modern common law of contract has a global reach. It is commonplace for the House of Lords, the High Court of Australia and the Supreme Court of Canada to pay careful attention to each other's views in this area and by no means unheard of to note the relevance of the United States or the great civil law systems. It is a great pleasure in this context that three of the authors come from outside of England and Wales, one from Singapore and two from Australia. Still, this remains an account of the English law of contract and does not attempt an exhaustive statement of other material or a detailed analysis of the Commonwealth decisions. We do hope, however, to have drawn attention to some of the most interesting and instructive material.

Michael Furmston

Abbreviations

<i>Anson</i>	Beatson (ed) <i>Anson's Law of Contract</i> (28th edn, 2002)
<i>Atiyah</i>	Atiyah, Adams, MacQueen <i>Sale of Goods</i> (11th edn, 2005)
<i>Beale</i>	Beale <i>Remedies for Breach of Contract</i> (1980)
<i>Bower Estoppel</i>	Bower and Turner <i>The Law Relating to Estoppel by representation</i> (4th edn, 2003)
<i>Burrows Remedies</i>	Burrows <i>Remedies for Torts and Breach of Contract</i> (3rd edn, 2004)
<i>Burrows Restitution</i>	Burrows <i>The Law of Restitution</i> (2nd edn, 2002)
<i>Carter</i>	Carter <i>Breach of Contract</i> (2nd edn, 1991)
<i>Carter and Harland</i>	Carter and Harland <i>Contract Law in Australia</i> (4th edn, 2002)
<i>Carter, Peden and Tolhurst</i>	Carter, Peden and Harland <i>Contract Law in Australia</i> (5th edn, 2007)
<i>Cartwright</i>	Cartwright <i>Unequal Bargaining</i> (1991)
<i>Cheshire, Fifoot and Furmston</i>	Cheshire, Fifoot and Furmston's <i>Law of Contract</i> (15th edn, 2005)
<i>Cheshire and Fifoot</i> (Australian edn)	Seddon and Ellinghaus <i>Cheshire and Fifoot's Law of Contract</i> (8th Australian edn, 2002)
<i>Chitty</i>	<i>Chitty on Contracts</i> (29th edn, 2004) vol I
<i>Clarke</i>	Clarke <i>The Law of Insurance Contracts</i> (5th edn, 2006)
<i>Collins</i>	Collins <i>The Law of Contract</i> (4th edn, 2003)
<i>Competition Law</i>	Whish <i>Competition Law</i> (4th edn, 2001)
<i>Derham</i>	Derham <i>Set-off</i> (3rd edn, 2003)
<i>Duggan, Bryan and Hanks</i>	Duggan, Bryan and Hanks <i>Contractual Non-Disclosure</i> (1994)
<i>Farnsworth</i>	<i>Farnsworth on Contracts</i> vol 1 (3rd edn, 2004)
<i>Goff and Jones</i>	Goff and Jones <i>The Law of Restitution</i> (6th edn, 2002)
<i>Goode</i>	<i>Goode on Commercial Law</i> ed and fully revised by Ewan McKendrick (4th edn, 2009)
<i>Hanbury and Martin</i>	Martin (ed) <i>Hanbury and Martin Modern Equity</i> (16th edn, 2001)

Abbreviations

<i>Heydon and Loughlan</i>	Heydon and Loughlan <i>Cases and Materials on Equity and Trusts</i> (7th edn, 2007)
<i>McKendrick</i>	McKendrick (ed) <i>Force Majeure and Frustration of Contract</i> (2nd edn, 1995)
<i>Marshall</i>	Marshall <i>Assignment of Choses in Action</i> (1950)
<i>Mason, Carter and Tolhurst</i>	Mason, Carter and Tolhurst <i>Restitution Law in Australia</i> (2nd edn, 2008)
<i>Meagher, Gummow and Lehane</i>	Meagher, Gummow and Lehane <i>Equity: Doctrines and Remedies</i> (4th edn, 2004)
<i>Ogus</i>	Ogus <i>The Law of Damages</i> (1973)
<i>Oughton, Lowry and Merkin</i>	Oughton, Lowry and Merkin <i>Limitation of Actions</i> (1998)
<i>Palmer</i>	Palmer <i>Bailment</i> (3rd edn, 2010)
<i>Pollock</i>	Pollock <i>Principles of Contract</i> (13th edn)
<i>Sharpe</i>	Sharpe <i>Injunctions and Specific Performance</i> (2nd edn, 1992)
<i>Simpson</i>	Simpson <i>A History of the Common Law of Contract</i> (1975)
<i>Starke</i>	Starke <i>Assignment of Choses in Action in Australia</i> (1972)
<i>Treitel</i>	Treitel <i>The Law of Contract</i> (12th edn, 2007, by Peel)
<i>Waddams</i>	Waddams <i>The Law of Contracts</i> (5th edn, 2005)
<i>Walker</i>	Walker <i>The Law of Contract and Related Obligations in Scotland</i> (3rd edn, 1995)
<i>Whish and Rose</i>	Whish and Rose ‘Restrictive Agreements and Competition in ch 40 of <i>Chitty on Contracts</i> (27th edn, 1994) vol II
<i>Williston</i>	Williston <i>Treatise on the Law of Contract</i> (3rd edn, 1957)
AA 1996	Arbitration Act 1996
BEA 1882	Bills of Exchange Act 1882
BS(A)A 1882	Bills of Sale (Amendment) Act 1882
BSA 1878	Bills of Sale Act 1878
C(RTP)A 1999	Contracts (Rights of Third Parties) Act 1999
CA 1985	Companies Act 1985
CA 1989	Companies Act 1989
CA 2006	Companies Act 2006
CA 1998	Competition Act 1998
CCA 1974	Consumer Credit Act 1974
CLSA 1990	Courts and Legal Services Act 1990

CPR 1987	Consumer Protection (Cancellation of Contracts Concluded Away from Business Premises) Regulations 1987
EA 2002	Enterprise Act 2002
ERA 1996	Employment Rights Act 1996
HRA 1998	Human Rights Act 1998
IA 1986	Insolvency Act 1986
LA 1980	Limitation Act 1980
LP(MP)A 1989	Law of Property (Miscellaneous Provisions) Act 1989
LPA 1925	Law of Property Act 1925
LPCD(I)A 1998	Late Payment of Commercial Debts (Interest) Act 1998
PAA 1971	Powers of Attorney Act 1971
RPA 1976	Resale Prices Act 1976
RTPA 1976	Restrictive Trade Practices 1976
SGA 1979	Sale of Goods Act 1979
UCTA 1977	Unfair Contract Terms Act 1977
UTCCR 1999	Unfair Terms in Consumer Contracts Regulations 1994

Table of statutes

References in the right-hand column are to paragraph numbers

A	
Access to Justice Act 1999	
Pt II (ss 27–34)	5.70
s 27	5.66, 5.70
28	5.70
29	5.70
58a(4)	5.69
Accommodation Agencies Act 1953	
s 1	6.212
Administration of Justice Act 1956	
s 18	6.84
57(2)	6.84
Sch 2	6.84
Administration of Justice Act 1970	
s 11	8.149
40(1)	1.19
Administration of Justice Act 1982	
s 6	8.17
15	6.189
Sch 1	6.189
Air Force Act 1955	
s 203	5.77
Arbitration Act 1889	
.....	2.158, 2.180
Arbitration Act 1950	
s 4(1)	5.92
27	5.92
Arbitration Act 1979	
s 1–4	5.92
Arbitration Act 1996	
.....	1.30, 2.180
s 2(2)(b)	5.92
5(2)(a)–(c)	2.354
(3)	2.354
(5)	2.354
7	3.43
9	3.113, 5.92
41	2.154
(2), (3)	2.197
49	8.29
67	6.64a
68(2)(g)	5.92
69	3.16, 5.92
82(2)	6.301, 6.332
85, 86	5.92
90	3.100, 3.113

Arbitration Act 1996 – <i>cont.</i>	
s 103(2)(c)	5.92
Army Act 1955	
s 203	5.77
(1)	6.236

B	
Bankruptcy Act 1914	
s 42(1)	2.174
Bills of Exchange Act 1882	
s 1	2.262
2	2.313
3	2.313
(2)	2.316
(3)	2.315
4	2.318
5(2)	2.315
7(1)	2.315
(3)	2.315
9	2.316
10	2.317
12(1)	2.318
17	6.128
20(1), (2)	2.319
23	6.128, 6.160
24	2.314, 2.319, 6.93
25	6.93, 6.110, 6.123, 6.128
26(1)	2.314, 6.128, 6.160
(2)	2.314, 6.128
27(2)	2.36, 2.61
29	6.160
(1)(b)	2.36
38(2)	6.331
49(1), (2)	6.92
51	2.318
53	6.258
54	2.314, 2.319, 6.51
55	2.314, 2.319, 6.51
62(1), (2)	2.95
64(2)	2.320
73	2.61, 2.313
75	6.258
83	2.262, 2.313
85(2)	6.337
89	2.313
91(1)	6.128