CHAPTER 1

INTRODUCTION

THE DEVELOPMENT OF AUSTRALIAN CONTRACT LAW

[1.01] Australian common law, including contract law, may be seen as an emerging body of jurisprudence with its own distinctive niche in the common law world. While not denying its English heritage, with the abolition of appeals to the Privy Council and recognition of the High Court of Australia as the ultimate Court of Appeal in the Australian judicial system, it is no longer the case that Australian courts slavishly follow English precedents. Instead there is a greater willingness to develop the common law as adapted and appropriate to Australian society and conditions.

Recognition of the writ of assumpsit

[1.02] Australian contract law can trace its origins to the writ system employed by the common law in medieval England. This system was based on a limited number of causes of action recognised by the common law, each cause of action being represented by a form of writ for pleading the relevant case. If the wording of a particular writ could accommodate the circumstances that arose in a particular case, the plaintiff was entitled to a remedy. Failure to complete the writ properly—even in the form of writing—meant that the claim failed.

There were two forms of writ which were recognised as being available for contract-type disputes: debt and covenant. However, both had their limitations which prevented them from being useful for actions for breach of promise. The writ of covenant was for breach of a promise contained in a deed, while a writ of debt could only be used where work had been fully performed, or in the case of money that had been lent, where the sum in dispute was an agreed amount. Accordingly, neither writ was suitable for cases involving an informal exchange of promises.

[1.03] A writ for a dispute based on an exchange of promises was not recognised until *Slade*'s case in 1602. The writ in that case is recorded in the case report and is extracted below in order to give an idea of the complexity and intricacy involved in the system of the time. The case concerned a claim by a farmer called John Slade for damages in the amount of £16 for breach of a promise by one Humphrey Morley to pay for the farmer's harvest of wheat and rye, despite

repeated demands for payment. Note how the plaintiff farmer used a trespass writ and pleaded that he had been 'injured and hath sustained damage' as a result of the breach.

[1.04] To a modern reader the formality of the language and expression in the old cases may be difficult to navigate. To assist with comprehension of the following case, certain words and passages have been emphasised in bold.

Slade's Case

(1602) 4 Co Rep 91; 76 ER 1072
King's Bench

<91a> Be it remembered that heretofore, that is to say, in the term of St Michael last past, before the lady the Queen at Westminster, came **John Slade**, by Nicholas Weare his attorney, and **brought here into the Court** of the said lady the Queen, then there, his certain bill against Humphrey Morley, in custody of the marshal, &c. of **a plea of trespass upon the case**: and there are pledges of prosecuting, to wit, John Doe and Richard Roe, which said bill followeth in these words:

> **John Slade complaineth of Humphrey Morley**, being in custody of the marshal of the Marshalsea of the lady the Queen before the Queen herself, for that, that is to say, **that whereas the said John**, the 10th day of November, in the thirty-sixth year of the reign of the said Lady Elizabeth, now Queen of England, &c. **was possessed** for the term of divers years then and yet to come, **of and in one close of land**, with the appurtenances in Halberton, in the county aforesaid, **called Rack Park**, containing by estimation eight acres, **and** being so possessed thereof, the said **John** afterwards, that is to say, on the said 10th day of November, in the thirty-sixth year aforesaid, **had sowed the said close with wheat and rye**, which wheat and rye in the close aforesaid, by the said John (so as before is said) being sowed, afterwards, that is to say, on the 8th day of May, in the thirty-seventh year of the reign of the said lady the now Queen, were grown into ears, the said Humphrey, on the aforesaid 8th day of May in the said thirty-seventh year aforesaid, the said wheat and rye in ears upon the close aforesaid (as before is said) then growing, at Halberton aforesaid, in consideration that the said John then and there, **at the special instance and request of the said Humphrey had bargained and sold unto the said Humphrey to the use** and behoof **of the said Humphrey, all the ears of wheat and corn which then did grow upon the said close, called Rack Park** (the tithes thereof to the rector of the church of Halberton aforesaid due only excepted) **did assume, and then and there faithfully promised, that he the said Humphrey £16 of lawful money of England to the aforesaid John** in the Feast of St. John the Baptist, then next following, would well and truly content and pay: yet the said Humphrey, his assumption and promise <91b> aforesaid little regarding, **but endeavouring and intending the said John of the aforesaid £16 in that part subtilly and craftily to deceive and defraud, the said £16 to the said John, according to his assuming and promise, hath not yet paid, nor any way for the same contented him, although the said Humphrey** thereunto afterwards, that is to say, on the last day of September, in the thirty-seventh year of the reign of the said lady the now Queen aforesaid, at Halberton

> aforesaid, **by the said John was oftentimes thereunto required, but the same to pay him, or any way to content him, hath altogether refused, and doth yet refuse; whereupon the said John saith he is injured, and hath sustained damage to the value of £40 and thereof he bringeth suit**, &c.

[1.05] The reporting of the decision itself is short. It seems that the jury hearing the case was satisfied that Humphrey Morley had agreed to purchase the wheat and rye but initially were not sure that the terms of the agreement were as alleged by John Slade. However, they made this finding following a ruling by Justices Walmesley and Fenner, the two judges who were sitting with them. John Slade was therefore awarded £16 damages and costs in the amount of 20 shillings.

John Slade was able to succeed despite there being no writ specifically available for breach of an unwritten promise because it was argued with ingenuity by his lawyer that a writ of trespass, designed for a claim against a person for wrongly doing something (a *misfeasance*), could also be used for a claim against a person for wrongly *not* doing something (a *nonfeasance*). Thereafter this adapted form of pleading—which came to be known as a writ of *assumpsit*, based on the defendant's assumption of an obligation—became the writ used for claims for breach of contractual promise.

Requirement of consideration

[1.06] Following the abolition of the writ system two causes of action in particular emerged which were relevant to contractual claims. One was the descendent of the writ of covenant and enforced the promises made in a formal deed, the formality of the document and solemnity of its execution under seal providing the rationale for its enforcement. The second was *assumpsit* for enforcement of contracts not made under seal, which later came to be known as 'simple contracts'. An element of the pleading of *assumpsit* was the 'consideration'—the motive behind the defendant's promise. While initially a matter of evidence, consideration became an essential element in establishing a simple contract.

[1.07]

Rann v Hughes

(1778) 4 Brown 27; 7 Term Reps 350n; 101 ER 1014n

Court of Exchequer Chamber

Rann and another were executors of the will of Mary Hughes deceased. Isabella Hughes was the administratrix of the estate of John Hughes, who had died intestate. While they were alive Mary and John had several disputes which were referred to arbitration, with the result that John was to pay Mary a sum of £983 in settlement. This amount was still outstanding at the time John died. After Mary died, her executors made a demand for payment of the debt on John's estate, believing it to be worth at least £3000. Isabella promised that the amount would be paid, but failed to do so since there were insufficient funds in the estate. The executors thereupon sued Isabella,

claiming that her promise had not been as administratrix but in her own right, and therefore not dependent on there being sufficient funds in the estate. The plaintiffs were successful at trial, the verdict being upheld on appeal to the King's Bench. On appeal to the Court of Exchequer this judgment was reversed in favour of the defendant. This reversal was challenged by a writ of error. The defendant maintained that the promise was made as administratrix, but that even if it was a promise to be personally liable it was unenforceable either because the contract was not made in writing or because there was no consideration. It was submitted on behalf of the plaintiff that:

> <31> In reason, there is little or no difference between a contract which is deliberately reduced into writing, and signed by the parties, without seal, and a contract under the same circumstances, to which a party at the time of signing it puts a seal, or his finger on cold wax. In the case of a deed, ie an instrument under seal, it must be admitted that no consideration is necessary; and in the year 1765, it was solemnly adjudged in the court of King's Bench (*Pillans v Van Mierop* 3 Burr 1663), that no consideration was necessary when the promise was reduced into writing.

However, the defendant's counsel submitted that:

> <32> … the duty of an executor or administrator is to collect the effects of the deceased, and apply the same as far as they will extend, to the payment of the debts of the deceased, in a due course of administration, and to distribute the surplus, if any, amongst the legatees or next of kin; no creditor can claim from the representative beyond the amount of the effects, and yet there may be inducements to a representative to enter into an engagement with a creditor, for the positive payment of his debt, in consideration that the creditor will give him time for such payment, or will abstain from pursuing legal measures to recover his demand, or the like; and the creditor grants the indulgence. In these cases, there is a reasonable foundation to interpret the promise of the executor, as an additional security to the creditor; who, in confidence thereof, accedes to terms of forbearance and delay, which may be attended with the loss of witnesses, and other consequences injurious to the creditor. But the present case did not afford a pretext of any benefit or indulgence stipulated for by the defendant, or any thing to be done or omitted by the plaintiffs, as a consideration for the promise stated to have been made by the defendant; and which the plaintiffs contend, ought to subject her, out of her own estate, to the payment of the debt claimed; though it appeared upon the record, that the defendant had faithfully discharged her duty, and honestly applied the effects of the deceased in the payment of his debts, in a proper course of administration.

The Court accepted the submissions of the defendant and found no error in the judgment of the Court of Exchequer. Isabella's promise was not enforceable against her due to the lack of writing and the absence of consideration.

[1.08] Accordingly, after *Pillans v Van Mierop* and *Rann v Hughes* promises were enforceable when made under seal or if supported by sufficient consideration.

[1.09] However, viewing consideration only in terms of being the reason for the promise meant that moral obligations or 'ties of conscience' were sufficient for the purpose. Consideration, as it is known today, was not recognised until the early nineteenth century.

[1.10]

Eastwood v Kenyon

(1840) 11 A&E 438; 113 ER 482

Queen's Bench

The plaintiff acted as guardian for an infant girl after her father died, spending money for her education and general well-being. He borrowed money secured by a promissory note for this purpose. When the girl attained majority, she undertook to repay the plaintiff the amount he had borrowed. After the girl married, her husband (the defendant) assumed the promise to repay the amount. The defendant failed to pay and the plaintiff brought an action to recover the amount promised.

The Court (delivered by Lord Denman CJ) <447> It was … argued for the plaintiff that the declaration disclosed a sufficient moral consideration to support the promise … <450> The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society; one of which would be the frequent preference of voluntary undertakings to <451> claims for just debts. Suits would thereby be multiplied, and voluntary undertakings would also be multiplied, to the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult. Taking then the promise of the defendant, as stated on this record, to have been an express promise, we find that the consideration for it was past and executed long before, and yet it is not laid to have been at the request of the defendant, nor even of his wife while sole (though if it had, the case of *Mitchinson v Hewson* (1799) 7 TR 348, shews that it would not have been sufficient), and the declaration really discloses nothing but a benefit voluntarily conferred by the plaintiff and received by the defendant, with an express promise by the defendant to pay money.

A worthy motive was therefore not sufficient to constitute consideration: instead something of value was required.

Equitable estoppel

[1.11] The next major development in Australian contract law did not occur until the High Court's decision in *Waltons Stores (Interstate) Ltd v Maher* in 1988.[1] This case held that in certain circumstances a plaintiff may have a cause of action in equity based on a promise that is not supported by consideration. It is necessary in such cases for the plaintiff to show detrimental

1 (1988) 164 CLR 387. See Chapter 7.

reliance on the promise with the knowledge of the defendant. If this is shown equity will seek to address the defendant's unconscionable conduct by granting a remedy which avoids the detriment suffered the plaintiff. This doctrine of 'equitable estoppel' is examined in greater detail in Chapter 7.[2]

Potential reform

[1.12] In May 2012, the then Labor Federal Government issued a discussion paper to explore the scope for reforming contract law in Australia.[3] Drivers for reform that were identified in the discussion paper included the increasingly complex landscape of common law, equitable and restitutionary principles, as well as various Commonwealth, state and territory legislation that may govern contractual relations in this country. The discussion paper also noted a desire to improve certainty, simplify the law and remove unnecessarily technical rules, harmonise differences that continue to exist in the contract law around Australia due to continuing differences in state and territory statutes, support innovation and maximise participation in the digital economy, and internationalise the law to facilitate cross-border trade and investment.[4] In relation to internationalisation, it was noted that Australia's first, second and fourth largest trading partners (China, Japan and South Korea respectively) have systems of law which differ significantly from Australia's English-heritage common law system. The contract law in Australia's third largest trading partner, the United States, has also diverged from its origins in the English common law.[5] These differences in legal systems may result in increased risks and costs and lost opportunities. It was also noted that there have been ongoing attempts to harmonise law within the European Union and that failure to take cognisance of those changes may also result in lost opportunity.[6]

The Federal Government did not regard reform as an 'all or nothing' approach. Instead, options identified for reform include:

- *Restatement*, which would entail making only minimal changes to the substance of the law while expressing the law in a single text to increase its accessibility, either in a similar fashion to a non-binding, American-style restatement or a binding codification;
- *Simplification*, which would involve changing the law to eliminate unnecessary complexity without attempting a general overhaul; and
- *Full-scale reform*, which would mean making significant changes to the substance of contract law.[7]

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2 See L Willmott, S Christensen, D Butler and B Dixon, *Contract Law,* 5th edn, Oxford University Press, Melbourne, 2018, Chapter 7.

3 Attorney-General's Department (Cth), *Improving Australia's Law and Justice Framework: A Discussion Paper Exploring the Scope for Reforming Australian Contract Law* (2012).

4 Ibid, 3–6.

5 Ibid, 11–14.

6 Ibid, 16–17.

7 Ibid, 18–19.

The Labor Government was defeated at the 2013 federal election, and reform of contract law was not part of the Coalition Government's agenda. The question of a legislative reform of contract law has therefore lost impetus for the time being.

QUESTIONS FOR REFLECTION

(1) Equitable estoppel is a manifestation of Australia developing its own species of common law. It has been observed that Indigenous Australians had a concept of contract and the trading of goods and services.[8] It has been further suggested that modern Australian contract law needs to integrate its Aboriginal antecedents to properly mature.[9]
   (a) Do you agree with this suggestion?
   (b) How might such a process of integration be effectively achieved?
   (c) What implications would this have for the existing common law in Australia?

(2) What would be the advantages and disadvantages of each of the different options for possible reform of Australian contract law, such as:
   - restatement;
   - simplification; and
   - full-scale reform?

8 MP Ellinghaus, 'Towards an Australian Contract Law', in MP Ellinghaus, AJ Bradbrook and AJ Duggan (eds) *The Emergence of Australian Law*, Butterworths, Sydney, 1988, 44–69, especially at 54–63.

9 Ibid, especially 65–9.