
Book reviews

Editor: Peter Lithgow

THE CONSTRUCTION AND PERFORMANCE OF COMMERCIAL CONTRACTS

The Construction and Performance of Commercial Contracts by S A Christensen and W D Duncan: The Federation Press 2014. Pages: i-iii; 1-526; Index 527-556.

The Construction and Performance of Commercial Contracts is a new Australian text providing legal analysis and guidance from an Australian point of view of issues that arise in the construction and interpretation of commercial contracts.

The modern Australian approach to the construction of commercial contracts requires that a contract is to be interpreted as having the meaning that would be given to it by a reasonable businessperson in the position of the parties. Consistent with this approach is the need to ascertain what the reasonable businessperson understands the words of the contract to mean, including an understanding of the surrounding circumstances and the commercial purpose or objective of the contract. This approach is highlighted in recent High Court cases commencing with *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 and subsequently *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181; *Pacific Carriers v BNP Paribas* (2004) 218 CLR 451; *Zhu v Treasurer of New South Wales* (2004) 218 CLR 538; *Royal Botanic Gardens & Domain Trust v South Sydney Council* (2009) 240 CLR 45 and *Electricity General Corp v Woodside Energy Ltd* (2014) 88 ALJR 447.

Chapter 2 provides discussion and analysis of general principles of construction as well as issues such as the construction of standard form contracts, correction of mistakes and the implication and severance of terms in a contract.

Subsequent chapters deal with specific types of clauses commonly found in commercial contracts. Chapter 3 deals with termination focusing on clauses that extend or vary the common law basis for termination. Chapter 4 deals with liquidated damages and Ch 5 with exclusion and limitation of liability clauses. This includes discussion of the operation of the *Australian Consumer Law* insofar as it may limit the ability of a party to contract out of certain statutory provisions.

A second group of chapters (Chs 9 to 13) deal with issues such as contingent conditions, time, confidentiality, notice and further assurance and cooperation clauses.

The obligation on contractual parties to cooperate is generally accepted to have originated in the decision of *Mackay v Dick* (1881) 6 App Cas 251, although just how this “obligation” to cooperate is enforced by courts is still the subject of difficulty – see for instance Kirby P in *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130 at 133. A further difficulty arises as to whether such an obligation is an express clause or an implied term.

Further, chapters (Chs 14 to 16) deal with clauses dealing with novation, nomination and assignment of contractual obligations.

The chapter on guarantees (Ch 17) provides a useful guide to this area and is followed by a chapter dealing with the related (see the table at p 489) but separate issue of clauses providing an indemnity, including third party indemnity provisions.

The final two chapters deal with clauses providing for alternative dispute resolution mechanisms and clauses dealing with jurisdictional issues which may arise from interstate or international contractual arrangements.

This excellent new work provides substantial practical guidance for both general issues of construction of contracts but more particularly, to issues that arise in relation to the construction of

specific clauses frequently encountered in commercial contracts. *The Construction and Performance of Commercial Contracts* is recommended to all those involved in drafting, implementing and enforcing commercial contracts in Australia.

P W Lithgow

THE LAW OF AFFIDAVITS

The Law of Affidavits by John Levingston: The Federation Press, 2013. Pages: i-xxiv; 1-166; Jurisdiction Summaries 167-275; Precedents 277-333.

Despite being a lawyer for almost 30 years, I cannot remember being offered any formal training in relation to the preparation and drafting of affidavits. The practicalities of affidavits were not discussed at law school and from the earliest days in practice it seems you were drafting affidavits on the basis of precedents (if you were lucky) or simply muddling through on the basis of experience and reference to the relevant rules.

With these matters in mind, *The Law of Affidavits* provides expert commentary together with useful precedents and summary by State, various federal jurisdictions and New Zealand of the relevant court rules proscribing to the form, substance and use of affidavits.

The text provides clear guidance and analysis of aspects of affidavits. The objective of an affidavit is to have admissible, relevant and appropriate evidence before the court. Consideration is given to the form of the affidavit, issues in relation to particular deponents (ie inability to speak or understand English, blind deponents etc.).

Issues in relation to the content of the affidavits canvas the presentation of evidence of conversations, joint deponents and matters which may be the subject of privilege. Questions of expert evidence are also analysed.

Practical issues such as preparation of an affidavit by reference to issues arising in the pleadings, *Evidence Act* exceptions to permit deponents to refer to hearsay material (see generally *Evidence Act 1995* (Cth) ss 62-74) objections to evidence in affidavits and the cross-examination of deponents are also covered.

This excellent work provides a ready repository of the law and practice in relation to the use of affidavits in all jurisdictions in Australia and New Zealand.

The precedents provide useful guidance and when read in conjunction with the relevant rules in the appropriate jurisdiction, *The Law of Affidavits* provides a clear and concise guide and explanation of relevant law and practical aspects regarding the making and use of affidavits.

P W Lithgow