

**BOOK REVIEW: “THE LAW OF
CONTRACT” (SECOND EDITION)**

BY RAYMOND J. FRIEL

(ROUND HALL SWEET & MAXWELL, 2000)

THE HON. MR. JUSTICE HUGH GEOGHEGAN*

Immediately after a Bar final examination in the law of contract in the early sixties, one of the students (now a distinguished senior counsel) plaintively approached a rather crusty examiner (long deceased) and asked him whether his question concerning “mutual mistake” was based on Anson or Cheshire and Fifoot. “It is based on the law” was the testy reply. It was, however, widely believed at the time that “the law” meant “Anson”, whereas the student had been brought up in Cheshire and Fifoot. The question had not been a foolish one in that what Anson called “mutual mistake” was for the most part described as “common mistake” by Cheshire and Fifoot, the latter reserving the expression “mutual mistake” for the situation where the parties were at cross-purposes rather than under a common misapprehension. This anecdote is introduced to illustrate that terminology and classifications are not always uniform as between writers on the law of contract. It is not, therefore, any criticism of the second edition of Mr. Raymond J. Friel’s book on the law of contract to suggest that it should be read in conjunction with other books on the same subject. His book is at any rate an excellent overview of the law of contract and the concepts involved in it which will be particularly helpful to students. I do not think that it is intended as a book which would give a ready answer to a practitioner in relation to a specific

* Judge of the Supreme Court.

contractual problem, but like all good general textbooks it would lead him or her on the right lines.

It is to be noted that the book is simply called "The Law of Contract" and not specifically the Law of Contract in Ireland although the author is the Head of the School of Law in the University of Limerick. Quite apart from any marketing considerations, this would seem to be sensible as quite frankly there is not a very distinctive Irish law of contracts. Forty years ago or so, there was a short paper supplement to Cheshire and Fifoot on the specific Irish aspects of the law of contract written by the late Mr. Dowrick, then Reader in law in Trinity College, Dublin. It was rarely resorted to, as there was very little distinctively Irish contract law. In more recent years there has been the work of Dr. Robert Clark of U.C.D. It is important that we have the benefit of these books of Mr. Friel and Dr. Clark, if only because there is English statute law which impinges on the law of contract in that jurisdiction and to a lesser extent there is relevant Irish statute law. The Sale of Goods and Supply of Services Act, 1980 and the Electronic Commerce Act, 2000 are particularly important and they are given the treatment they deserve by Mr. Friel. It is doubtful whether Irish case law has established any difference of substance between the common law on contract in this jurisdiction and the common law as developed in England. In matters of pure common law, differences can sometimes arise between the two jurisdictions more by accident than by design. As the recent judgment of the Chief Justice in *Glencar Explorations plc v. The County Council of the County of Mayo*¹ illustrates, differences in the area of tort believed by some to be discerned as a consequence of *Ward v. McMaster*² may be more apparent than real. The same would appear to be true with even more force in the area of contract. *Clayton Love*

¹ [1993] 2 I.R. 237.

² [1998] 1 I.R. 337.

*and Sons (Dublin) Ltd. v. British Irish Steampacket Co. Ltd.*³ was a judgment of the Supreme Court, coincidentally delivered at the same time as the famous *Suisse Atlantique*⁴ case in the House of Lords. The *Suisse Atlantique* case held that there was no rule of law that an exemption clause was not applicable to a case of breach of fundamental term or fundamental breach of contract but that there was merely a prima facie rule of construction to that effect. This issue was never really argued in *Clayton Love* before the Supreme Court and that case would appear to be authority merely for the proposition that if such a rule of law existed it applied equally to a time clause. Presumably, that is why Mr. Friel has suggested that the case is now of doubtful authority.

It is not easy to think of other important Irish cases on the law of contract. Although the author deals with cases well known to Circuit Court practitioners such as *Grealish v. Murphy*⁵ and *Gregg v. Kidd*,⁶ these cases are really more relevant to voluntary transactions.

Fine distinctions that would have fascinated some of us as students in areas such as mistake and illegal contracts, to say nothing of the “frustration” cases deriving from the cancelled coronation and the blockade of the Suez Canal rarely enter the practical arena of the courts. As a consequence, most of the cases dealing with basic principles cited by Mr. Friel are the same cases as students would have been familiar with over a great many years. Indeed, returning to the area of mutual mistake this reviewer is glad to see that the two ships called “Peerless” are still happily sailing as joint flagships in relation to that topic.

There are four areas in particular in the modern law of contract in relation to which a good Irish textbook would be

³ (1970) 104 I.L.T.R. 157.

⁴ *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361.

⁵ [1946] I.R. 35; 80 I.L.T.R. 111.

⁶ [1956] I.R. 183.

particularly useful to practitioners as well as students. These are: competition law, e-commerce transactions, the impact of European Union law on the law of contract and some elementary comparative law, particularly in relation to the laws of the more important members of the European Union. The treatment of e-commerce transactions in this book is excellent. There is an adequate treatment of the European Communities (Unfair Contract Terms) Directive⁷ in the chapter dealing with implied terms. Perhaps in future editions of the book the author might consider a more detailed treatment of competition law. Obviously, it is not a subject which can be explained in great depth in a general book on the law of contract but arguably the treatment need not be quite as brief as it is in this second edition. To some extent, this is surprising as in connection with contracts in restraint of trade, the author quite correctly observes that "[i]ndeed, one cannot emphasise enough the extent to which competition rules now govern this entire area."

Trading within the European Union has become so important that it seems somewhat of a pity that there is not a full chapter explaining, as economically but as accurately as possible, such differences of principle as there may be in the law of contract in the major civil law jurisdictions.

One of the few areas in the law of contract in which there has been quite a considerable amount of case law both in the High Court and the Supreme Court is in relation to contracts for the sale of land which were allegedly made "subject to contract" and to the related and often intertwined question of the requirements of a note or memorandum to satisfy the Statute of Frauds. To most practitioners in this field the most important case in the past twenty years was *Mulhall v. Haren*⁸ in which Keane J. (as he then was) gave a reasoned, and in the event definitive judgment which appears to have been clearly approved of by the Supreme Court in

⁷ Directive 93/13/EEC April 21 1993 [1993] O.J. L95.

⁸ [1981] I.R. 364.

Boyle v. Lee.⁹ But rather surprisingly, the table of cases gives only one reference to *Mulhall* and that in a footnote. In so far as the book is intended to direct the students up the right avenues this would seem unfortunate. By contrast the author gives considerable treatment to *Boyle v. Lee*, presumably because it is a Supreme Court decision, but the judgments in that case are in some instances open to more than one interpretation and at any rate are not uniform in their reasoning. The only certainty would seem to be that the law is correctly stated in *Mulhall v. Haren* and any still unresolved problems must await further clarification by the courts.

Subject to these few criticisms - with the added quibble that more specialised proof reading might have avoided the odd unintended slip such as “Reid L.J.”, Mr. Friel has produced a useful book with an excellent and pleasing lay out. The Table of Statutes is particularly to be commended for clearly displayed content. Whether there be a continued booming economy in this country or a calamitous recession, the next ten years are likely to be fruitful in producing Irish case law in the area of contract. We can confidently look forward to a third edition of Friel.

“The Law of Contract” (Second Edition) by Raymond J. Friel (Round Hall Sweet & Maxwell, 2000), 382 pages.

⁹ [1992] 2 I.R. 437; [1992] I.L.R.M. 65.