

Book Reviews

“Exemption Clauses and Implied Obligations of Contracts”

By John Livermore

(The Law Book Company Limited 1986; Price \$45.00sc)

John Livermore defines exemption clauses as terms in a contract excluding or restricting or modifying a remedy or liability arising out of a breach of a contractual obligation. His book deals with such exemption clauses and the extent to which the Courts and various legislatures have endeavoured both to limit the operation of exemption clauses and to impose obligations upon parties to a contract notwithstanding express provisions of the contract to the contrary. It is not concerned with the implication of terms by necessity in the circumstances which are dealt with in **Codelfa Construction Pty Limited v. State Rail Authority of N.S.W.** 149 CLR 337

The author begins with the attempts made by the Courts to read down exemption clauses by the doctrine of breach of a fundamental term and the clarification of that doctrine as involving no more than an instance of the proper construction of the clause in question. (The latest word by the High Court is **Darlington Futures Ltd v. Delco Australia Pty Limited**, December 1986). He then proceeds to deal with legislative attempts to restrict freedom of contract both by prohibiting or qualifying exemption clauses and by the compulsory imposition of additional obligations on the parties to a contract.

Section 9 of the Common Carriers Act 1902 (N.S.W.) is an early example of statutory interference with the right of a contracting party to exclude, restrict or modify a remedy or liability arising out of a breach of a contractual obligation to take care and reference is made in Chapter 2 to the High Court's consideration of that provision in **Commissioner for Railways v. Quinn** 72 CLR 345. The more recent approach of legislatures has been the granting of wholesale judicial discretions under such legislation as the Contracts Review Act (N.S.W.), authorising a Court to declare void a contract or a provision of a contract found to have been unjust in the circumstances relating to the contract at the time it was made. Such legislation is also dealt with in Chapter 2.

In dealing with legislative control of exemption clauses, no clear distinction is drawn (and maybe it does not matter) between legislative attempts to prevent contractual freedom to exclude, restrict or modify a remedy or liability which might arise out of a breach of a contractual obligation and legislative attempts to prohibit the exclusion of contractual terms which are imposed by statute. In the analysis of an exemption clause it will sometimes be important to determine whether the exemption clause is designed to exclude liability for breach of a contractual obligation (such as an obligation to take reasonable care) or to exclude the applications of terms imposed by statute (such as Section 19 of the Sale of Goods Act) to the extent that such exclusion is permitted.

Provisions such as Section 62 of the Sale of Goods Act (which renders void a provision in a contract for a consumer sale purporting to exclude or restrict any liability for a breach of the conditional warranty implied by sections 18, 19 or 20) and Section 68 of the Trade

Practices Act (which renders void any term of a contract for the supply of goods or services to a consumer that purports to exclude, restrict or modify liability for breach of a conditional warranty implied by Division V of the Act) are of a different nature from provisions such as Section 9 of the Common Carriers Act and Contracts Review Act. Section 62 of the Sale of Goods Act and Section 68 of the Trade Practices Act are, in a sense, merely ancillary provisions in aid of other provisions of the legislation imposing terms upon contracting parties independently of consensus between them to that effect.

Chapter 3 is concerned with the author's perception of deficiencies in the Sale of Goods Act and embarks tentatively upon a consideration of warranties implied by the Sale of Goods Act. It is by no means, (and does not purport to be), an exhaustive treatment of the difficulties which have arisen in relation to the meaning of the implied terms as to merchantable quality and fitness for purpose and a considerable part of the chapter is concerned with United Kingdom law reform proposals for implied warranties and a critique of those proposals.

Chapter 4 addresses the question of whether exemption clauses in commercial contracts should be subject to statutory tests and is concerned, in particular, with the question of whether unreasonableness or unconscionableness are suitable criteria for control of exemption clauses in commercial contracts, as distinct from consumer contracts. Reference is made to the Contracts Review Act (N.S.W.) but there is no significant attempt to comment on the detailed criteria which the Act lays down for the purpose of determining whether a contract is unjust in the circumstances in which it is made.

Chapter 5 is concerned with warranties as to title, quiet possession and freedom from encumbrance. Intermingled with that question, however, is the question of liability of a manufacturer to a consumer in circumstances where there is no privity of contract between them. That material does not appear to sit happily with the balance of Chapter 5 and would, perhaps, be more appropriately dealt with in Chapter 6 which is expressly concerned with privity of contract and exemption clauses. Chapter 5 is generally a critique of legislation dealing with warranties as to title rather than an exposition of the law in that regard.

Chapter 6 is limited to the consideration of judicial developments in relation to the third party beneficiaries of exemption clauses (“The Eurymedon”, “Himalaya clauses” and the like). In a sense, it is out of place with the balance of the material in the book. The chapter concludes with a reference to policy considerations in the development of principles permitting third parties to take advantage of exemption clauses in contracts to which they are not privy. The chapter is not an attempt to state the principles which are to be gleaned at the authorities.

Chapter 7 contains the results of surveys apparently conducted under the direction of the author in Tasmania. Having regard to the numbers involved in the surveys, one

might have some doubt as to the validity of any statistical conclusion which can be drawn from the results. Finally, in Chapters 8, 9 and Appendix B the author expresses views concerning the desirability for further legislative intervention in relation to exemption clauses.

The work does not purport to be a text book or an exhaustive statement of the law or collection of authorities and legislation concerning exemption clauses and obligations implied by statute. The work originated in the author's report to the Law Reform Commission of Tasmania on a reference on "Exclusion Clauses and Implied Obligations in Contracts Relating to the Supply

of Goods and Services". The approach and content of the book reflect that origin and the author does not attempt to set down an exposition of the law as it is in any particular jurisdiction. For that reason, it will be of limited value to practitioners. On the other hand, it may be a useful starting point for research. Some Courts today have a tendency to seek the policy considerations involved in a question before them (the foreword was written by the President of the Court of Appeal), and there are to be found in the work lucid, helpful and compelling observations as to such matters.

□

A.R. Emmett, Q.C.

ABC Guide to the Federal Court of Australia

By Matthew Smith.

Pages i-xvii, 1-230. 1986. Australia: The Law Book Co. Ltd. Price: (soft cover) \$29.50

This book, by a member of the Sydney Bar, is the third recent publication using an alphabetical format to deal with a particular area of law; the earlier two volumes being Bartley and Brahe's **The ABC of Evidence** and Bartley, Brahe, Swanson and Foggo's **The ABC of Liquor Law in New South Wales**. Smith's book, as were the earlier two "ABC's", is a book designed for the practitioner.

The author's aim in producing the book is summarised in the opening sentence of his preface:-

"In this book, I have attempted a short encyclopaedic guide to the jurisdiction and procedure of the Federal Court of Australia."

Law Book Company publicity avoids the author's oxymoron by describing the book thus:-

"A concise, reliable and up-to-date guide to the complex body of rules governing the jurisdiction of the Federal Court and its procedure . . . The work thus provides short but authoritative answers to most questions which concern practitioners who deal with the court."

The book commences with a quite useful table of contents which, as one would expect, is arranged alphabetically. Where the particular topic is dealt with under several sub-topics (as about half of them are) the table lists the sub-topics. For example, the table contains the following entry as to "Supplementary Jurisdiction":-

"SUPPLEMENTARY JURISDICTION

1. Accrued jurisdiction
2. Associated jurisdiction
3. Incidental powers
4. Inherent powers"

The actual topics are then dealt with and range, alphabetically, from "**Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984**" to "**Written submissions — see Appeals**". There is extensive use of cross-referencing both in the major articles or items and also by way of short inserts alphabetically arranged between major articles providing the reader with an indication of the major articles which deal with the particular subject matter. For example, at page 165, between the major articles entitled "**National Health Act 1953**" and "**Ombudsman Act 1976**" are the following one line cross-references:

"**Next Friend** — see Disability

New trial — see Appeals

Notice of produce — see Discovery; Evidence

Oath — see Affidavits; Evidence"

The book seems to be accurately described as concise, reliable and up-to-date and, again returning to the author's preface, his hope that he has given quick answers to most questions encountered in dealing with the Court is justified.

For example, major articles such as those entitled "**Commencement of Proceedings**", "**Industrial Proceedings**", "**Interim Orders**", "**Judicial Review**" and "**Jurisdiction**" fulfil these criteria and are readable and informative.

The arrangement and cross-referencing results in a most comprehensive picture of the jurisdiction, procedure etc. of the Court and usefully indexes the relevant topics. It is not inappropriate, however, to identify one or two apparent omissions. For example, although the grant of jurisdiction to the Federal Court made by the addition of Section 39B of the **Judiciary Act** in 1983 is usefully dealt with as the second sub-topic under the item "**Judicial Review**", one looks in vain for headings or cross-reference entitled "**Prerogative Writs**", "**Officer or Officers of the Commonwealth**" or "**Commonwealth — Officer or Officers**". Even though there are cross-references to the topic "**Judicial Review**" against the terms "**Mandamus**", "**Prohibition**" and "**Injunction**", and "**Writ**", inclusion of these headings, with appropriate cross-references, would enhance a future edition.

Similarly, one would have thought that in sub-topic 4 "**Inherent Powers**" of the topic "**Supplementary Jurisdiction**", it would have been appropriate to have a cross-reference to the topic "**Security For Costs**", where there is reference to a specific head of inherent power.

Since the author sees the work as being a useful research tool (and that it no doubt is) it could have been usefully improved, at minimal increase in production costs, by the addition of tables of cases, statutory provisions and Rules of Court. Perhaps another matter for the next edition?

Apart from these very minor criticisms, the **ABC Guide to the Federal Court** is a most useful addition to the material available in relation to the Federal Court. It will be of real use to any member of the Bar practising in that Court, although undoubtedly of more use to newer practitioners. It is a book which will justify the production of relatively frequent new editions brought about by decisions of the Court and by likely statutory changes which will enlarge, and probably complicate, the jurisdiction of the Federal Court.

□

F.L. Wright