

BOOK REVIEWS

Directors' Powers and Duties

Peter Watts

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Directors' Powers and Duties, written by Professor Peter Watts of the University of Auckland, is a recent publication that has already won acclaim, having received the JF Northey Memorial Book Award as the best legal book published in 2009 by a New Zealand-based author.¹

Directors' Powers and Duties is not a comprehensive account of all aspects of Company Law, nor is it to be regarded as a “manual for directors”.² Rather, as its name suggests, it concerns the “powers and duties of directors of companies registered under New Zealand’s Companies Act 1993”.³ This limited focus serves the book well — the powers afforded to and duties owed by directors are two of the more complex areas of the law in their own right, as the Companies Act 1993 (the Act) does not provide all the answers.

Further, Watts is at pains in chapter one to emphasise that this book is *not* about what he calls “corporate governance”.⁴ It is concerned only with the law, for corporate governance goes too far and introduces elements of management science into inherently legal issues. As Watts illustrates, this is a problem:⁵

If most companies ... come to adopt a governance practice, it is usually not long before someone argues that directors are legally negligent if they have not conformed to, or ensured that the company has conformed to, the practice.

While Watts does not provide an explicit definition of “corporate governance”, his words suggest that he views it pejoratively, as interfering with the autonomy of directors to run their company.

In chapters three and four, Watts deals with directors’ powers. Of particular note, Watts emphasises that ultimately, power rests with a

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1 Peter Watts *Directors' Powers and Duties* (LexisNexis, Wellington, 2009).

2 *Ibid.*, at 1.

3 *Ibid.*

4 *Ibid.*, at 3.

5 *Ibid.*

company's shareholders.⁶ While s 128 of the Act prima facie grants the powers of management of a company to its directors, the shareholders can exercise their power to override decisions made or to remove directors from their post, provided that they follow the correct procedure and have 75 per cent of the voting strength.⁷ Further, shareholder approval is necessary in certain situations, such as where the company purports to enter into a major transaction for the purposes of s 129.

This effort at explaining directors' powers is helpful, as the Act is largely silent on this point, beyond the starting presumption in s 128. By placing this discussion in the initial chapters, and before setting out specific duties, Watts is able to establish clearly that when one refers to directors owing their duties to the company, the "company" refers to shareholders as a whole. This is an important point, one to which Watts returns in chapter five.

Watts devotes more time to the duties owed by directors to their companies than he does to the powers they enjoy. Indeed, 7 of the 13 chapters of *Directors' Powers and Duties* focus on the duty side of the equation. This is predictable and understandable, for while the Act confers broad decision-making powers upon directors,⁸ it is only when someone alleges a breach of those duties that the courts become involved.

In chapter five, Watts provides a useful summary of the sources of individual duties owed by directors, before analysing each individual duty in detail. He points out that while there is a "detailed set of directors' duties in the [Companies Act 1993]"⁹, the Act is not a code. As such, common law and statutory duties coexist, meaning that common law duties can close any gaps that may exist in the Act.¹⁰

In this chapter, Watts also considers the issue of shareholder primacy. Before the Act was enacted, shareholders essentially determined the purposes of the company and the content of directors' duties.¹¹ Yet this was coupled with the fact that the courts would not judicially review decisions made by directors before they were carried into effect. Comparing the pre- and post-Companies Act 1993 scenarios, Watts concludes that little has changed, and that shareholder primacy remains an integral part of New Zealand's company law.¹²

However, he cautions that shareholder primacy is not to be confused with 'stakeholder theory', a by-product of the corporate social responsibility movement. Supporters of stakeholder theory believe that directors of companies, when making a decision, should be under a legal duty to consider the interests of not only shareholders, but also a wider

6 Ibid, at 27.

7 Ibid.

8 See Companies Act 1993, s 128.

9 Watts, above n 1, at 125.

10 Ibid, at 126.

11 Ibid, at 127.

12 Ibid, at 134–138.

group including “employees, creditors in general, the local community in which the company trades, the environment, and potentially others”.¹³ Watts clearly does not support stakeholder theory, nor the corporate social responsibility movement in general. Indeed, he dismisses this theory with a minimum of fuss, calling any move to compel directors to take account of non-shareholders’ interests nothing less than “socialism”.¹⁴ While some may disagree with Watts’ analysis of stakeholder theory, the fact that he spends time explaining his beliefs gives greater credibility to his argument, and it helps the reader better to appreciate that the following chapters focus only on duties owed to the company, and not to any external interests or persons.

Following from this discussion, separate chapters are devoted to each of the main duties owed by directors — both under the Act and at common law. Chapter 6 considers the duty to act in the best interests of the company, chapter 7 liability for a director for profiting from their position, chapter 8 conflicts of interest, chapter 9 the duties of care, diligence and skill, chapter 10 directors’ duties during insolvency and chapter 11 the proper purposes doctrine.

There is nothing particularly novel about these key duties, as they have been accepted and applied for many years. However, each chapter has been carefully and concisely written to deal with differing viewpoints and approaches concerning the application of each individual duty. Further, as is the case throughout the book, Watts provides summaries of key judgments and statutory provisions to help the reader better appreciate what the law is, how it got to that point and why it is important in a wider context.

For example, in discussing the scenario where a director diverts a corporate opportunity away from the company for personal gain, Watts critically analyses two competing views.¹⁵ On one side is the so-called ‘maturing opportunities’ approach, where a director will only be in breach of the corporate opportunity doctrine if he or she takes advantage of an opportunity that the company was already in the process of trying to exploit. But another line of argument suggests that a director of a company may not take advantage of a corporate opportunity at any time. Watts sets out arguments and authorities in favour of each position in order to illustrate their relative strengths and merits. Ultimately, he concludes that the maturing opportunities approach is simply a part of the wider doctrine: that is, where a director exploits a maturing corporate opportunity, he will clearly be in breach. But there will be other times where a director acting for personal gain will also be in breach of the doctrine, regardless of whether any steps were taken by the company.

Without the added value of case summaries and their relevance, any

¹³ *Ibid.*, at 134.

¹⁴ *Ibid.*, at 140.

¹⁵ *Ibid.*, at 199–204.

discussion of directors' duties runs the risk of becoming confusing and thus counter-productive. It is to Watts' credit that his analysis does not suffer from this problem.

In the final chapter of *Directors' Powers and Duties*, Watts deals with the liability of directors to third parties in tort, contract and equity. At first glance, this chapter seems out of place — an “orphan”¹⁶ according to its author — in a book that is otherwise focused on directors' powers and duties in relation to the company. However, it is a valuable inclusion, as third parties have made numerous attempts to sue directors personally for breach of contract or for tortious wrongs. Watts points out that directors have no special status in private law.¹⁷ Thus, in terms of tort, directors will be personally liable if the elements of that tort can be established against them.¹⁸ They do not possess any special immunity by virtue of their status as directors.¹⁹ As for contractual claims, again, directors possess no special immunity, so that if they agreed to be bound, they will be personally liable. What Watts attempts to illustrate in this chapter is that the title ‘director’ simply confers upon the holder or holders additional powers and responsibilities. It does not allow them to act irresponsibly and then hide behind their title to avoid liability. In a sense, this chapter acts as a final warning to directors about their powers and duties, and, as a result, is a valuable addition to the book.

Some books promise much but deliver little. This is not one of those. Rather, Watts has produced a book that is thorough and easy to understand. Indeed, no less an authority than the Chief Justice has praised Watts' work, describing it as “a consummate work of scholarship”.²⁰ It is difficult to disagree with that sentiment. Watts is an expert in his field, and his knowledge and enthusiasm for the subject are displayed throughout the 388 pages of the book.

While *Directors' Powers and Duties* deals with a subject that is often complex, Watts has produced a book that is accessible to judges, practitioners and law students. Further, considering the recent issues relating to failed finance companies and the actions of their directors, it is clear that the book will be beneficial to directors and shareholders as well. It follows that *Directors' Powers and Duties* is a welcome addition to the field of company law, and is fully deserving of the positive recognition that it has received thus far.

16 Ibid, at 355.

17 Ibid, at 356.

18 See *Body Corporate 202254 v Taylor* [2008] NZCA 317, [2009] 2 NZLR 17; *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 (HL); *Standard Chartered Bank v Pakistan Shipping Corp (Nos 2 and 4)* [2002] UKHL 43, [2003] 1 AC 959.

19 Watts, above n 1, at 360.

20 Dame Sian Elias, speaking at the book launch of *Directors' Powers and Duties*, 25 November 2010 <www.law.auckland.ac.nz>.

Privacy Law in New Zealand

Stephen Penk and Rosemary Tobin (eds)

LEWIS MILLS*

Until this year, anyone seeking a textbook on privacy law in New Zealand was out of luck. Discussion of privacy law was limited to some comment in *Media Law in New Zealand*¹ and Burrows' chapter on the common law tort in *The Law of Torts in New Zealand (Todd)*.² The limited range of texts available reflects the fact that privacy law has only recently emerged as a discrete area of scholarship in New Zealand. The Court of Appeal's acceptance of a privacy tort in *Hosking v Runting (Hosking)*³ helped to launch privacy as a separate field of study, while the Law Commission's ongoing large-scale review of the area⁴ has drawn privacy to the attention of the public. These developments make the publication of a textbook devoted to the subject timely.

*Privacy Law in New Zealand*⁵ begins with two chapters on privacy concepts generally and Māori concepts of privacy, written by Stephen Penk and Khylee Quince, respectively. These chapters are a useful primer on privacy law. Penk's succinct discussion of privacy's status as a right, interest or value is interesting. The omission of privacy from the New Zealand Bill of Rights Act 1990 remains something of a stumbling block to its acceptance by the judiciary and its development as a legal concept, as illustrated by the reasoning of the Supreme Court in *Brooker v Police*.⁶ Penk also writes the third chapter, a comprehensive examination of the Privacy Act 1993. Although data protection is a less inspiring subject than the tort of privacy, the Act, as New Zealand's primary privacy legislation, warrants the thorough evaluation provided.

Chapter four is written by Rosemary Tobin, and discusses New Zealand's privacy tort. This is an important chapter for students and practitioners alike, and offers a deeper examination of common law privacy than space permits in *Todd*. Beginning with *Tucker v News Media Ownership Ltd*,⁷ Tobin covers the development of the tort before examining

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1 John Burrows and Ursula Cheer *Media Law in New Zealand* (5th ed, Oxford University Press, South Melbourne, 2005).

2 Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at ch 17.

3 *Hosking v Runting* [2005] 1 NZLR 1 (CA).

4 Law Commission *Privacy Concepts and Issues: Review of the Law of Privacy Stage 1* (NZLC SP19, 2008); Law Commission *Public Registers: Review of the Law of Privacy Stage 2* (NZLC R101, 2008); Law Commission *Invasion of Privacy: Penalties and Remedies: Review of the Law of Privacy Stage 3* (NZLC R113, 2010).

5 Stephen Penk and Rosemary Tobin (eds) *Privacy Law in New Zealand* (Brookers, Wellington, 2010).

6 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91.

7 *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 (HC).

in detail the *Hosking* action as it stands.⁸ All the appropriate authorities are covered, including District Court decisions in *L v G*⁹ and *Brown v Attorney-General*.¹⁰ Tobin discusses elaboration and consolidation of the tort before moving to consider specific issues and difficulties, including the relevance of identification, intention, a plaintiff's own culpability for criminal acts as a factor in reducing the expectation of privacy, and the position of public figures. The area of moral culpability is perhaps more conceptually interesting — and salacious — but is mentioned only briefly, and at the end of Natalya King's chapter rather than in Tobin's.¹¹ Cheer and others have previously written of the problematic nature of assessing a plaintiff's moral culpability, in particular the dangers of evaluating intimate relationships on the basis of idealised notions of morality.¹² This issue may become of greater importance as increasingly racy personal details and photographs are published on social networking sites and elsewhere on the Internet. It is too early to say whether the sort of judicial moralising evident from the English cases *Theakston v MGN Ltd*¹³ and *A v B plc*¹⁴ has been safely abandoned. This interesting debate could have received more attention.

Rounding off the first half of the text is a section by Penk on common law privacy protection in other jurisdictions. There are only a small number of Australian cases beyond the High Court of Australia authority *ABC v Lenah Game Meats*,¹⁵ with one of the only other appellate cases, *Giller v Procopets*,¹⁶ indicating that the Australian courts prefer to rely on breach of confidence and other actions rather than develop a privacy tort. Penk then moves to consider the Canadian cases. The emphasis in the case law is on police activity and the interaction with s 8 of the Canadian Charter of Rights and Freedoms, which protects against unreasonable search and seizure. This section is analogous to s 21 of the New Zealand Bill of Rights Act 1990, which, as Thomas J suggested in *R v Jeffries*,¹⁷ is really about protecting privacy.

Having considered Australia and Canada, Penk discusses the jurisprudence of the United Kingdom and the United States, spending slightly longer on the United States tort and Dean William Prosser's four formulations of privacy.¹⁸ Although the United States is the home of Warren and Brandeis' seminal article on privacy,¹⁹ its jurisprudence is arguably of less practical application to New Zealand than to other Commonwealth

8 Penk and Tobin, above n 5, at 84–86.

9 *L v G* [2002] NZAR 495 (DC).

10 *Brown v Attorney-General (Invasion of Privacy)* [2006] NZAR 552 (DC).

11 See Penk and Tobin, above n 5, at 317.

12 Ursula Cheer "The Future of Privacy: Recent Legal Developments in New Zealand" (2007) 13 *Canta LR* 169.

13 *Theakston v MGN Ltd* [2002] EWHC 137 (QB).

14 *A v B plc* [2002] EWCA Civ 337, [2003] QB 195.

15 *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* [2001] HCA 63, (2001) 208 CLR 199.

16 *Giller v Procopets* [2008] VSCA 236.

17 *R v Jeffries* [1994] 1 NZLR 290 (CA) at 319.

18 See Penk and Tobin, above n 5, at 124–125.

19 Samuel Warren and Louis Brandeis "The Right to Privacy" (1890–1891) 4 *Harv L Rev* 193.

jurisdictions. A future edition might afford United Kingdom jurisprudence more coverage, or include a separate chapter written by a British practitioner or academic. The influence of the British cases on privacy law in New Zealand is and will continue to be significant, yet discussion of these cases is squeezed into a section that includes three other jurisdictions. A separate chapter constructed along the lines of Tobin's analysis of the common law in New Zealand, tracing the development and extension of the breach of confidence action and including a more thorough consideration of major cases like *Douglas v Hello! Ltd*,²⁰ *Campbell v MGN Ltd*²¹ and *Murray v Express Newspapers plc*,²² would be useful. In addition, the rise of the 'super-injunction', which keeps secret the fact that an injunction was even sought (this reviewer is aware of one instance of a super-injunction being granted then lifted in New Zealand), could be considered. Further, it would be worth noting the effect of the developing strength of privacy as an accepted right and stand-alone cause of action in the United Kingdom. In 2008, a picture agency paid a substantial settlement to actress Sienna Miller instead of proceeding with a trial scheduled to come before Eady J, doyenne of privacy scholars and scourge of the tabloids. As well as injecting colour into the text, these instances provide a useful indication of what could happen in New Zealand if the scope of privacy protection were to be expanded beyond the narrow disclosure of private facts tort to include scenarios more in the nature of intrusion. Developments in the United Kingdom, a dynamic jurisdiction for privacy law, should be watched closely.

The second half of the text is devoted to applications of privacy law in different contexts. The usual suspects appear — health, the workplace and the Family Court — as well as areas that have not received as much comment, as in Tobin's chapter on privacy and children. In light of some of the progressive legislation passed by the previous government, including the Care of Children Act 2004 and the amendment of s 59 of the Crimes Act 1961, the rights of children have become a larger consideration in New Zealand law. Tobin presents a child-centred view of the *Hosking* decision, noting that more attention was paid to the celebrity status of the parents than to the children themselves.²³ In addition, the author confronts the Court of Appeal's difficult statement that the shopping trip could not attract a reasonable expectation of privacy because other people on the street would have seen Mrs Hosking and her children.²⁴ The point is surely the widespread dissemination of the children's images, not the fact that the children's presence could have been observed by others nearby. This is followed by a brief discussion of the decision of the English Court

20 *Douglas v Hello! Ltd* [2001] QB 967 (CA).

21 *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457.

22 *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2008] 3 WLR 1360 [*Murray*].

23 See Penk and Tobin, above n 5, at 260.

24 *Ibid.*

of Appeal in *Murray*,²⁵ where the Lords Justices reached the opposite conclusion from *Hosking* on almost identical facts. This interesting case would warrant further analysis in a United Kingdom-focused chapter as proposed above. Tobin moves on to consider children's privacy in relation to health and to schools, as well as the Broadcasting Standards Authority's jurisprudence on the issue. The chapter provides a novel and important thematic consideration of the place of children in privacy law.

Some ambivalence as to the intended readership of this book comes through in the selection of topics in the second half. In particular, Warren Brookbanks' chapter on privacy and mental health, and Natalya King's chapter on issues for producers and involuntary participants in reality television, seem to be geared towards practitioners rather than students. Brookbanks' chapter is very detailed, and might be more at home in a mental health law text. On the other hand, Stephen Penk's discussion of the concept of privacy, and his summary of future directions and issues in the final chapter, are both aimed at students of privacy law. The preface of the book acknowledges that different audiences will find different chapters valuable, but if it is to be a student text, the editors might sacrifice some of the more specialised chapters to permit a longer discussion of the difficulties and uncertainties of the current tort, and the theoretical underpinnings of privacy. Discussion of surveillance in its many forms, beyond surveillance by the state, could be expanded. This will not be to every student's taste; although there may be a number of true aficionados seeking a more comprehensive understanding of privacy within the compulsory tort law course, Burrows' chapter in *Todd* is more than adequate for most students at this level. In light of the Burrows chapter, the target student audience for this book is probably limited to those students undertaking specialised media law courses.

As to structure, the chapters on privacy and health, and privacy and mental health cover much of the same ground. Penk's discussion about refining the disclosure tort at the end of the book is largely covered by Tobin's detailed comments in her earlier chapter. A future edition might see analysis of the disclosure tort consolidated in one place. While the existence of some overlap is unavoidable in a text about privacy law, it perhaps reflects the particular difficulty in maintaining editorial coherency across nine authors writing on fairly disparate topics. However, the editors have been successful in dividing the concept into workable categories, and covering a large area of conceptual ground in a relatively short text. Less intimidating than weighty tomes like *Todd* or *Media Law in New Zealand*, *Privacy Law in New Zealand* is interesting and readable. It is a valuable study tool for privacy law students and will be of use to media law practitioners as well.

25 *Murray*, above n 22.

Contract as Assumption: Essays on a Theme

Brian Coote

MARK TUSHINGHAM*

I INTRODUCTION

Contract as Assumption: Essays on a Theme, by Emeritus Professor Brian Coote, is a collection of the professor's distinguished writings in contract law over the last five decades.¹ Across 11 chapters, the book presents Coote's writing in the areas of consideration, exception clauses, damages, privity and pure economic loss in tort. These writings have at their heart Coote's theory of contract law: contracting parties assume, rather than incur, contractual liabilities. While such a theory might not seem especially groundbreaking, the consequences of the author's view certainly resonate in each chapter. Seminal cases are deconstructed and analysed with a high level of precision and clarity.

The book is a success in two major respects. First, it celebrates the lifelong work of a scholar who, as was noted at the book's launch in May 2010, has truly put the University of Auckland Faculty of Law on the world map. Few New Zealand scholars could rival Coote's formidable contribution to contract law jurisprudence both domestically and throughout the Commonwealth. Secondly, the book stands as a lasting embodiment of the author's major writings, a sentiment expressed in the Preface by the book's editor, Professor Rick Bigwood, who spearheaded the project. The book's contemporary relevance is also of particular interest and is addressed in the third part of this review. *Contract as Assumption* deserves a prized place on any judge's, practitioner's or student's bookshelf and is well worth a read.

II ESSAYS ON A THEME

Central to Coote's theory of contract law is the premise that in the private law sphere, contractual liability is a self-assumed obligation of a particular type:²

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¹ Rick Bigwood (ed) *Contract as Assumption: Essays on a Theme* (Hart Publishing, Oxford, 2010).

² Brian Coote "The Essence of Contract" in Bigwood (ed), *ibid.*, 7 at 42.

In essence, a contract is a promise or undertaking in respect of which legal contractual obligation has been assumed by means which the law recognises as effective for that purpose.

Coote suggests that this assumption of obligation differentiates contract law from tort law. While liability in tort is generally imposed ab extra by the state once wrongs have been committed, contractual liability (according to Coote) is assumed as a simultaneous incident of contract formation. Without the institution of contract law, the author states, parties would have no means by which to assume legal obligations as distinct from mere moral obligations.³

“The Essence of Contract”, the second chapter of the book, was originally published in two separate articles in 1988 and 1989. Here, Coote outlines how his theory of contract formation (contract as assumption) differs from other theories. He succinctly describes some of the main contract theories (such as will theory, promise theory and bargain theory) and then critically assesses them. He goes on to propose the need for a “more inclusive theory” and suggests that people require promises to be upheld in a stronger manner than mere moral or social obligations.⁴ Thus, a contractual promise functions as a particular type of self-assumed mechanism to create legal obligations. Coote’s theory is by no means a widely accepted definition of what a contract is and how it functions. Indeed, this point is apparent when he discusses the raft of theories that exist to explain the institution of contract. However, it is refreshing to see a comprehensive application of his theory to the main areas covered by subsequent chapters in the book: consideration, exception clauses and damages.

Consideration is the central focus of the first three chapters. Chapter three is an article that Coote wrote in response to the English Court of Appeal decision in *Williams v Roffey Bros & Nicholls (Contractors) Ltd (Roffey Bros)*.⁵ He suggests that a better explanation of consideration in an executory bilateral contract is the “reciprocal assumptions of obligation”,⁶ rather than practical benefits flowing from the “mere performance of a duty already owed to the promisee” as the English Court of Appeal instead held.⁷ Scathingly, the author asserts that the Court in *Roffey Bros* “hopelessly [compromised] the doctrine of consideration”.⁸ A simple application of his theory would have avoided this outcome. Again, Coote uses his theory in chapter five to discredit the joint promisee principle enunciated in *Coulls v Bagot’s Executor and Trustee Co Ltd*.⁹ In a bilateral contract,

3 Brian Coote “The Essence of Contract” in Bigwood (ed), above n 1, 7 at 42–43.

4 *Ibid*, at 37–38.

5 *Williams v Roffey Bros and Nicholls (Contractors) Ltd* [1991] 1 QB 1 (CA).

6 Brian Coote “Consideration and Benefit in Fact and in Law” in Bigwood (ed), above n 1, 53 at 58.

7 *Ibid*, at 60.

8 *Ibid*.

9 *Coulls v Bagot’s Executor and Trustee Co Ltd* (1967) 119 CLR 460.

Coote suggests, consideration by a joint promisee is the acceptance of an obligation to pay rather than payment itself.¹⁰

The next area of the book presents some of Coote's most distinguished scholarship, written in the area of exception clauses. Chapter six was the first chapter in the widely acclaimed book, *Exception Clauses*.¹¹ Coote suggests the relevance of his theory to this area of the law is that:¹²

... exception clauses qualify the promises to which they relate, and hence take effect at the formation of the contract rather than as mere defences at the point of adjudication.

Under this view, exception clauses “determine whether and what rights shall arise from the promises which they qualify” when the parties assume contractual liability.¹³ Chapter six acts as a prelude to chapter seven, entitled “The Second Rise and Fall of Fundamental Breach”. This article was written after the House of Lords famously eschewed the doctrine of fundamental breach in *Photo Production Ltd v Securicor Transport Ltd* (*Securicor*).¹⁴ Coote suggests that his view of the function of exception clauses “leaves no need for the concept of fundamental breach” because “once ... exception clauses have taken effect at the formation of the contract, every breach thereafter of the residual contractual content of the agreement will be actionable”.¹⁵ As Coote points out, in *Securicor*, Lord Diplock based his decision on the view that “primary and secondary obligations were the product of the contract as a whole, including any exception or limitation clause and came into existence as modified by them”.¹⁶

The final part of the book moves to Coote's writing on contract damages. In chapter eight, “Contract Damages, *Ruxley*, and the Performance Interest”, he uses the House of Lords' decision in *Ruxley Electronics and Construction Ltd v Forsyth* to discuss the true function of common law damages for breach of contract.¹⁷ He argues that protecting the “performance interest” (being the interest that a promisee has in obtaining performance, as compared with the wider “expectation interest”, which covers expectation loss) should be accepted as a primary purpose of damages in contract.¹⁸ Coote explains the “performance interest” in contract as follows:¹⁹

10 Brian Coote “Consideration and the Joint Promisee” in Bigwood (ed), above n 1, 65 at 74.

11 Brian Coote *Exception Clauses: Some Aspects of the Law Relating to Exception Clauses in Contracts for the Carriage Bailment and Sale of Goods* (Sweet & Maxwell, London, 1964).

12 Brian Coote “The Second Rise and Fall of Fundamental Breach” in Bigwood (ed), above n 1, 99 at 106.

13 Brian Coote “The Function of Exception Clauses” in Bigwood (ed), above n 1, 81 at 90.

14 *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL).

15 Brian Coote “The Second Rise and Fall of Fundamental Breach” in Bigwood (ed), above n 1, 99 at 106.

16 *Ibid*, at 118.

17 *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (HL).

18 Brian Coote “Contract Damages, *Ruxley*, and the Performance Interest” in Bigwood (ed), above n 1, 127 at 130–134.

19 Brian Coote “The Performance Interest, *PanaTown*, and the Problem of Loss” in Bigwood (ed), above n 1, 165 at 167.

[W]hat distinguishes an effective contractual promise from any other is that it is intended to, and does in fact, confer on the promisee an enforceable legal right to have the promise performed.

Coote acknowledges the competing view of the role of damages: to “compensate for the loss of the economic benefits of performance”.²⁰ But he goes on to show that performance does have intrinsic economic worth, such as in the context of promises that benefit third parties. Indeed, the next chapter is devoted to a discussion of *Alfred McAlpine Construction Ltd v Panatown Ltd* (*Panatown*) where Lords Goff and Millett both found that Panatown was entitled to its performance interest.²¹ It is no coincidence that in *Panatown*, both of their Lordships cited Coote’s article that is now reproduced in chapter eight, to which Lord Goff expressed his “indebtedness”.²² With the greatest sense of humility, the author concludes the chapter as follows: “those who accepted the invitation [to write about the performance interest] ... can be grateful that their contributions have been taken into account (and duly acknowledged)”.²³

In an interesting twist, the last part of the book features articles written by Coote in the areas of privity of contract and pure economic loss in tort. He provides a “subjective reaction” in chapter 10 to concerns raised by some academics after the enactment of the Contracts (Rights of Third Parties) Act 1999 (UK).²⁴ He draws parallels between this Act and the Contracts (Privity) Act 1982, with which Coote was heavily involved as a member of the Contracts and Commercial Law Reform Committee. He suggests that a bilateral or unilateral contract need not be the only way in which contractual obligation may be assumed.²⁵ The privity statutes, Coote suggests, “could very plausibly be regarded as having created a new form of contract, albeit of only limited application” in order to “plug a gap”.²⁶

Lastly, in chapter 11, Coote addresses head-on the difficulty of accepting that, in certain circumstances, legal obligation and liability can be assumed in tort for economic loss. He continues, “that was a difficulty that the chief progenitor of assumption of legal liability in the tort of negligent misstatement was prepared to face”,²⁷ referring to Lord Devlin in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, who conceived of

20 Brian Coote “Contract Damages, *Ruxley*, and the Performance Interest” in Bigwood (ed), above n 1, 127 at 134.

21 *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL).

22 *Ibid.*, at 556.

23 Brian Coote “The Performance Interest, *Panatown*, and the Problem of Loss” in Bigwood (ed), above n 1, 165 at 179.

24 Brian Coote “Contract not Trust: Some Questions About the Contracts (Rights of Third Parties) Act from Another Perspective” in Bigwood (ed), above n 1, 181 at 182.

25 *Ibid.*, at 185.

26 *Ibid.*

27 Brian Coote “Assumption of Responsibility and Pure Economic Loss in New Zealand” in Bigwood (ed), above n 1, 191 at 194.

a legal relationship in tort that was akin to contract.²⁸ Coote also raises further interesting questions about the recovery of expectation damages for economic loss in tort. It is fitting that Coote leaves the book on this precipice, paving the way for a broader discussion between judges and academics about the true boundary between assumption of liability in contract and tort. Indeed, this author believes that there is much to be gained from extending Coote's theory into the area of economic loss in tort.

III REFLECTIONS ON THE THEME

It might be thought that it would be difficult to maintain a theme across a compilation of articles in a book like *Contract as Assumption*. But Coote holds each chapter together through a masterful exposition of his central theory in different contexts. It can, however, be a little repetitive to hear a shortened version of his theory of assumption of contractual obligation in each article. Coote acknowledges this point in the first chapter but aptly points out: "lawyers, notoriously, tend not to read legal monographs from cover to cover".²⁹ Reviewers, on the other hand, do. The real benefit of the book comes from seeing how Coote's theme develops over the course of a series of articles in a particular area. This is most true in the chapters devoted to contract damages, an area of the law that is currently in vogue after the recent House of Lords decision in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)*.³⁰

In an addendum to chapter eight, Coote tacks on a brief discussion of *The Achilleas* and also the decision in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*, where the High Court of Australia gave an "emphatic endorsement of the performance interest".³¹ In *The Achilleas*, Lord Hoffmann and Lord Hope both approached the question of remoteness in contract damages from the perspective of the appellant's apparent assumption of responsibility. As Coote points out in the addendum, the essential question on this approach is whether "the losses for which recovery was being sought [were] of a type or kind for which the appellant charterer could be treated as having assumed responsibility".³² Even though Coote's thesis has its origins in a book written in 1964, *The Achilleas* demonstrates that it is still at the fore of contract law today in the area of remoteness of damages. While neither of their Lordships in *The Achilleas* cited Coote, it is a fitting tribute to the professor's celebrated scholarship that his theme

28 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).

29 Brian Coote "Introduction" in Bigwood (ed), above n 1, 1 at 5.

30 *Transfield Shipping Inc v Mercator Shipping Inc* [2008] UKHL 48, [2009] 1 AC 61.

31 *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8, 236 CLR 272. See Brian Coote "Contract Damages, *Ruxley*, and the Performance Interest" in Bigwood (ed), above n 1, 127 at 161.

32 Coote, *ibid*, at 160.

has gained currency at the highest level in this area of contract law as well as other areas. *The Achilles* demonstrates the contemporary relevance of Coote's writing and shows that the implications of his theory are far from having been fully explored.³³

IV CONCLUSION

The real gem of *Contract as Assumption* is that there is now a lasting embodiment of Coote's work contained in one place. Rather than being scattered as articles in multiple journals within the Commonwealth, the book serves as an easy reference point for those wishing to explore Coote's theme in a variety of different contexts. At the book's launch Professor Bigwood stated that he hoped *Contract as Assumption* would influence new scholars in the field of contract law who "might otherwise have overlooked Brian's writings".³⁴ It is hoped that the themes in the book will indeed spark more debate into the true essence of contract for many years to come.

33 The author does, however, explore the issue of remoteness of damages further in a recent article: Brian Coote "Contract as Assumption and Remoteness of Damage" (2010) 26 JCL 211.

34 University of Auckland Faculty of Law "Contract essays showcase scholar's work" (2010) <www.law.auckland.ac.nz>.

