THEORY AS PRACTICE AND PRACTICE AS THEORY –
THE INTEGRATED AND INTEGRAL CONTRACT SCHOLARSHIP OF
PROFESSOR MICHAEL FURMSTON

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Introduction

The Task and A Brief Overview

The task I embark on in this essay is not an easy one as I attempt to analyse – as far as I can – the entire corpus of contract scholarship by Professor Michael Philip Furmston. Yet, daunting as this task may be (as he is one of the foremost and most distinguished contract scholars in the world), it is also a pleasurable one inasmuch as this essay also constitutes a personal tribute to Professor Furmston in honour of his eightieth birthday. Indeed, our lives have been enriched – and, in fact, continue to be enriched – by his scholarship as well as (for many of us present today) our personal encounters with him. Singapore contract law has also been influenced – both directly as well as indirectly – by Professor Furmston (a point to which I will return a little later).

On a more general level, it will suffice for the moment to observe that Professor Furmston is somewhat of ‘a legal polymath’. Although I will be focusing on his contract scholarship in this essay, he is an expert in many other areas of the law as well. He has written books on the law of contract in both its general as well as specialist forms, the sale of goods and construction law, as well as articles, comments and essays on the law of tort. His writings span virtually every genre imaginable. As if this were not sufficiently impressive, Professor Furmston also edits an influential series of specialist law reports, the Construction Law Reports. However, his considerable contributions are not confined only to publications but encompass both teaching as well as the highest levels of academic administration. Insofar as the former is concerned, he was ranked as one of the top ten law teachers

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1 On 1 May 2013.
3 See below, nn 84, 86 and 94.
4 See below, n 95. Reference may also be made to M P Furmston, ‘Romalpa clause now invalid even against buyer’s unused stock’ [1984] Construction Industry Law Letter 98.
5 See below, n 97.
6 See eg below, n 107.
in the world in *The Times of London*,\(^7\) whilst, insofar as the latter is concerned, he was Dean of the Faculty of Law at the University of Bristol\(^8\) as well as Pro-Vice Chancellor,\(^9\) also at the University of Bristol. Somewhat further afield, he was also appointed the founding Dean of the School of Law at the Singapore Management University only some six years ago and has only recently stepped down from that appointment.

The main title of this essay attempts to capture the true essence not only of Professor Furmston’s contract scholarship (which is an integral part of any course on contract law) but also the model of the ideal legal scholar to which budding faculty members of law schools ought to aspire. In particular, at least some legal scholarship in general and contract law scholarship in particular has, in my respectful view, taken a turn for the worse insofar as they focus not only in a proverbial ‘sliced salami’ fashion on the intricacies of an esoteric part of a topic or even sub-topic (or sub-sub-topic) of the law of contract but also engage in the most abstract and abstruse of academic discourse. This can (save as regards inherently theoretical subjects such as jurisprudence) result in the undesirable divorce of legal scholarship from its practical application.\(^10\) An ideal piece of legal scholarship would be comprehensive as well as comprehensible but, most importantly, would embody the potential at least for practical application. After all, this is what the courts and lawyers are concerned with. And this would apply equally to law students, only a tiny fraction of whom would enter legal academia, the majority becoming practising lawyers or being engaged in work in the private or public sectors. This is not to state that innovative as well as thought-provoking scholarship is unimportant. That would be to throw the baby out with the bathwater. But I trust that many of you would agree with me that the integration of theory and practice in legal scholarship is probably the hardest task in legal academia. It is, however, the ideal to which, in my view, all legal scholars should strive and (hopefully) achieve in differing degrees. Professor Furmston, in my view, has achieved this ideal and is therefore the ideal role model for the budding legal academic. I will attempt to demonstrate during the course of this essay the manner in which Professor Furmston has achieved this ideal. However, before doing that, I hope that you do not mind me taking the liberty to speak briefly on how I first met Professor Furmston – if nothing else, because it might also reveal any conscious (or, more importantly, subconscious) bias on my part (although I hope that this will not be perceived to be the case).

Two ‘Meetings’

On a more personal level, I should begin by saying that I had two quite distinct ‘meetings’ with Professor Furmston. The first was in print form. I later had the privilege of meeting (and then collaborating with) him in person some years later. Let me begin by saying something about my first ‘meeting’ with him.

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\(^7\) See *The Times*, 16 October 2007.

\(^8\) For two stints, from 1982 to 1984, and again from 1995 to 1998.


When I first embarked on the study of contract law as a student approximately three decades and a half ago, there were – in the Singapore context – really only two contract textbooks which were utilised by students. The first was *Cheshire and Fifoot’s Law of Contract*¹¹ and the second was *Anson’s Law of Contract*.¹² There was a third, *Treitel’s Law of Contract*.¹³ However, this last-mentioned work was perceived (by the students at least) to deal with too many specialised points and was therefore to be referred to – if at all – after reading one or both of the first two textbooks just mentioned. Even this last-mentioned work has since evolved over the ensuing decades, but that is another story for another time. There were other contract texts, of course. However, it was well-known that *Chitty on Contracts*¹⁴ was – and continues to be – a practitioner’s text. There was also Professor P S Atiyah’s *An Introduction to the Law of Contract*,¹⁵ but the title of this book was (in my view at least) a misnomer. It was – then at least – more similar to *Treitel’s Law of Contract*, albeit in a much more compressed format.

It seemed quite clear to many of us that if we wanted to read a text which would not only furnish us with an understanding of the basic principles of the common law of contract but also with the critical analysis that would prompt us to reflect further (or, if adapted personally, would at least make it appear as if we had reflected further on the relevant principles), then the text to read would be *Cheshire and Fifoot’s Law of Contract*. As you might have guessed, that was indeed my personal choice. The book I studied from was then in its ninth edition (I also recall the distinctive purple cover, which was quite different from the staid light blue cover of the previous (eighth) edition, published in 1972). It is hard to believe that the book is now in its (very recently published) sixteenth edition, but, then again, many decades have flowed by since my first encounter with the book. Most of you will, of course, be familiar with the fact that the book was first published in 1945. Professor Furmston commenced his involvement with this work with the sixth edition to which I will refer (published in 1964). So this year also marks the forty-ninth year in which he has been involved in this work. Extremely few legal scholars can lay claim to such longevity, for this is not only more than a literal generation but is also the average working life of an adult nowadays. Even more remarkably, Professor Furmston continues to be very active not only in teaching (in more than one university) but also in research. Indeed, he was, as mentioned above, founding Dean of the Law School of the Singapore Management University (incidentally, only the second law school in Singapore’s history), stepping down only recently. He continues to teach and research as Professor of Law at the Singapore Management University.

What, then, of my second ‘meeting’? As providence would have it, Professor Furmston visited the Faculty of Law at the National University of Singapore (where I was then teaching) in 1986. Not surprisingly, he delivered lectures on the law of contract. I think that this particular visit was indeed providential because, as I shall recount below, I was later to embark on a Singapore

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¹¹ Then in its ninth edition, and now in its sixteenth edition.
¹³ Then in its fourth edition, and now in its thirteenth edition.
¹⁴ Then in its twenty-fourth edition, and now in its thirty-first edition.
¹⁵ Then in its second edition, and now in its sixth edition (updated by Professor Stephen A Smith, since this latest edition).
and Malaysian edition of *Cheshire, Fifoot and Furmston’s Law of Contract*. This is an appropriate juncture, in my view, to turn to a short biography of Professor Furmston himself before proceeding to analyse his legal scholarship in the law of contract.

**A Short Biography**

Professor Michael Philip Furmston was born on 1 May 1933. Educated at Wellington School, Somerset, he proceeded to read law at Exeter College at the University of Oxford, where he rendered a stellar performance, taking a first both in his undergraduate law degree as well as in the BCL in 1956 and 1957, respectively. Indeed, that particular cohort of BCL graduates represents a banner year for that particular programme and is talked about till this day. This is not surprising as that year included Lord Hoffmann, 16 Professor F M B Reynolds and, of course, Professor Furmston. First class honours in the BCL were then very rare but that year had so many excellent candidates that an unprecedented number of firsts were awarded – *inter alia*, to the persons just mentioned.

Professor Furmston commenced his academic career as a Lecturer in English law at the University of Birmingham shortly after graduating from the BCL programme in 1957, where he taught until 1962, when he joined Queens University, Belfast, as a lecturer. In 1964, he joined Lincoln College, Oxford University as a Fellow and was appointed University Lecturer in Law in 1965. He remained at the University of Oxford till 1978, when he joined the University of Bristol as a Professor of Law. He also held numerous visiting professorships at universities in, *inter alia*, Belgium and Singapore. He retired in 1998 and was appointed Emeritus Professor of Law and Senior Research Fellow at the University of Bristol. However (and after a relatively short break), this, paradoxically, marked the beginning of an equally (if not more) vibrant and busy schedule – but this time beyond the shores of the United Kingdom. He was appointed the founding Dean as well as Professor of Law of the School of Law at the Singapore Management University in 2007, stepping down in 2012, and where he continues to research and teach as Professor of Law. Professor Furmston was also McWilliam Visiting Professor in Commercial Law at the University of Sydney and Senior Fellow at the University of Melbourne Law School during this period.

Before I conclude this part of the essay, I would like to observe that Professor Furmston’s prose and style makes for easy reading. In particular, he is able to convey difficult concepts and/or arguments simply, albeit not simplistically. This is *not* common in legal scholarship generally. More than that, his awareness of the extralegal context also brings to bear a practical relevance that is at once both instructive as it is refreshing. On occasion at least, his work also reveals his interests outside the law as well. For example, it is well-known (at least amongst some of us) that Professor Furmston follows the sport of association football quite closely. 17 One of his earlier pieces on a case involving the restraint of trade doctrine in general and the footballer George Eastham in particular is of special interest in

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16 Who was the Vinerian Scholar for that particular year.
17 He is an avid fan of Manchester United Football Club.
this regard. This was a perceptive comment on the decision of Wilberforce J (as he then was) in the English High Court decision of Eastham v Newcastle United Football Club, Ltd, in which the learned judge (soon to be elevated directly to the House of Lords) held that the retain and transfer systems then in existence were in unreasonable restraint of trade. Of interest are the first two paragraphs of the piece itself. The very first sentence refers to the then forthcoming World Cup competition which was to be hosted by England in a few years time (in 1966). The paragraph itself is cautiously optimistic and, as it turned out, England did in fact win the World Cup for the first (and, to date, only) time after a tough match against West Germany (after extra time) in the final. It was also the first (and, to date, only) time that a player (Sir Geoff Hurst) had scored a hat-trick in a World Cup Final although one of the goals is still shrouded in controversy to this day as it was unclear whether after striking the crossbar, the ball had in fact wholly crossed the line. The next paragraph is a succinct description of the context in which the case concerned was decided and is (if I may say so) an eminently clear description of how the English Football League operated during that particular point in time. By way of a denouement of sorts, as a result of Wilberforce J’s decision, George Eastham’s transfer from Newcastle United Football Club to Arsenal Football Club proceeded accordingly and changes were subsequently made to the transfer system. Eastham himself was to also flourish in his international career and in fact was part of England’s World Cup winning squad in 1966 although (unfortunately) he did not have the opportunity to actually play. As a result, he did not receive a winner’s medal under the rules at the time although he did belatedly receive, some thirty-three years later, a winner’s medal as a result of a change of policy on the part of the International Federation of Association Football (more popularly known as ‘FIFA’) who decided to retrospectively award medals to all squad members in all the World Cup competitions. I hope that the reader will forgive this little excursus into the sphere of football as this is one of Professor Furmston’s interests (which, incidentally, I happen to share as well). I should add that, insofar as the topic of sports is concerned, Professor Furmston is an even more avid follower of cricket but, unfortunately (and quite apart from my relative ignorance of the sport itself), I could find no suitable case on which to base a further personal narrative.

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On Theory and Practice

19 [1963] 3 WLR 574.
20 There is one player, though, who had scored in every round of the World Cup (including the final), viz, the great Brazilian winger, Jairzinho. This occurred in the next World Cup Finals held in Mexico in 1970.
21 Shortly after the 1966 World Cup, Eastham was transferred to Stoke City Football Club, his final club before retirement from playing in the English Football League, and with whom he won a League Cup winners medal, scoring the winning goal in the 1972 Final against Chelsea Football Club. He was – and remains – the oldest player to score as well as receive a winner’s medal in this particular competition.
The Books

Introduction

Professor Furmston has been the author as well as co-author of numerous books which I will refer to briefly in the course of this essay. Many, as we shall see, deal with discrete areas of (principally) contract law. However, there is one which may be justly described as the crown jewel in this entire corpus of work – to which our attention must now turn.

Cheshire, Fifoot and Furmston’s Law of Contract

I have already referred to Cheshire, Fifoot and Furmston’s Law of Contract. Indeed, like myself, innumerable students and lawyers the world over (and over a great many generations) have had their first ‘encounter’ with contract law in general and Professor Furmston in particular through this excellent textbook. Of all his many scholarly works, this is the most well-known and most widely read. Professor Furmston assisted and then ultimately assumed the reins for this world-renowned work. Indeed, it is a tribute to him that he was handpicked by Professor G C Cheshire to assist in a seminal work which would later become his as well. By the time the eleventh edition was published (in 1986), the title Cheshire and Fifoot’s Law of Contract had been changed to Cheshire, Fifoot and Furmston’s Law of Contract.

Interestingly, the various Prefaces to this book tell, collectively (and, unusually, as far as prefaces go), an extremely interesting – and I might add, very personal as well as heart-warming – story. Before I elaborate, it might be appropriate to begin – as they say – at the beginning. The first edition of G C Cheshire’s and C H S Fifoot’s The Law of Contract was first published in 1945. At that particular point in time, there were only a few other major contract texts, viz, Anson’s Law of Contract; 22 Pollock on Contract; 23 and Chitty on Contracts, 24 respectively. It was to be closer to two decades on before Sir Guenter Treitel’s book on contract law would be published. 25 There are of course so very many excellent contract texts at present 26 but, as at 1945, the situation was quite different. As I

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22 The Nineteenth Edition was published in the same year (viz, 1945), the Eighteenth Edition having appeared as far back as 1937.
23 Then in its Eleventh Edition (published in 1942); the Twelfth Edition was to appear a year later (in 1943).
alluded to earlier in this essay, Cheshire and Fifoot’s Law of Contract (now Cheshire, Fifoot and Furmston’s Law of Contract) brought something different to the reader. Indeed, this was reflected in the Preface in the very first edition where the learned authors observed thus:

Paley, in the preface to his one celebrated Principles of Moral and Political Philosophy, remarks that “when a writer offers a book to the public upon a subject on which the public are already in possession of many others, he is bound by a kind of literary justice to inform his readers, distinctly and specifically, what it is he professes to supply and what he expects to improve.” If we are to obey the first of these injunctions, we must say boldly that we profess to examine the principles underlying the English law of Contract, to indicate the difficulties which surround their application, to illustrate them from the accidents of litigation and the practices of life, and, where such a course seems profitable, to justify or excuse their vagaries by a reference to their history. To answer the second and more invidious injunction, we hasten to disown with Paley “any propensity to depreciate the labours of our predecessors, much less to invite a comparison between the merits of their performances and our own”; but we suggest that, even on so well-trodden a road, there is room for a new guide. Anson on Contract, for example, has directed the steps, not only of the present authors, but of generations of pupils. But the very success which has demanded the publication of eighteen editions has in some measure impaired its utility, and a mode of treatment, opposite sixty years ago, may be thought out of focus with present needs. Pollock on Contract, on the other hand, while it retains through successive editions the inimitable imprint of its distinguished author, does not profess to be comprehensive, and for this reason cannot be offered without support to the student.

Interestingly, the learned authors also proceed to furnish further background as to the timeframe concerning the publication of the book itself, as follows:


27 See G C Cheshire & C H S Fifoot, the Law of Contract (Butterworth & Co (Publishers) Ltd, 1945), p iii (emphasis in italics in the original text; emphasis added in bold italics).

28 See Cheshire & Fifoot, above, n 27, p iii.
The preparation of our book has been unduly protracted by the alarms and excursions of the last six years. Set aside in the early stages of the war, it was later resumed and had then to be largely rewritten. We are conscious that it has suffered in the process and that signs of over-writing may be apparent. Unexpected delays have aggravated the difficulty, always anxious, of absorbing current developments in Parliament and in the Courts, in the business world and in professional literature, and have accentuated the feeling, ever present to authors of text-books, that they may pursue, but can never overtake, the fleeting vision of the law. We may only hope that we have set an established subject in a new perspective, neither disdaining older authorities where they are valuable nor citing new cases merely because they are novelties.

Four more editions of this work were to be published before – almost two decades after the first edition had appeared on the scene – Professor Furmston, then a relatively young law lecturer, was acknowledged as having contributed to it. In particular, he is mentioned (in the Preface of the Sixth Edition) as one of ‘[t]he many friends whose kindly interest has led them to make suggestions and to challenge views’. \(^{29}\) However, Professor Furmston’s suggestions and views must have been significant as he is one of only six specifically named in the Preface itself. He is thanked again in the next edition (the seventh), some five years later, although, of the six persons specifically mentioned in the previous edition, he is the only one who is mentioned again in this edition. \(^{30}\) In fairness, though, it should be pointed out that one of the persons mentioned in the previous edition, W A N Alstead, was ‘elevated’ to a special mention as having ‘directed [the authors’] faltering and reluctant feet through the labyrinth’ \(^{31}\) of the (then) UK Monopolies and Restrictive Trade Practices (Inquiry and Control) Act 1948. \(^{32}\)

However, as already alluded to above, by the time of the next (the eighth) edition (published in 1972), \(^{33}\) Professor Furmston’s contributions were no longer to be acknowledged merely in the Preface; his name now appeared on the title page of the book itself (interestingly, W A N Alstead is still mentioned (now as the only name) in the Preface to this particular edition (once again for his assistance in the sphere of competition law)). This was a watershed moment of sorts and marks the beginning of his formal academic relationship with the original authors and the book itself which would ultimately lead to Professor Furmston taking over the reins of the work completely by the time of the publication of the very next (the ninth) edition (published in 1976). \(^{34}\) In his very first Preface, Professor Furmston gives us an interesting history as to how he first came to be associated with the book, as follows: \(^{35}\)

\(^{30}\) See G C Cheshire & C H S Fifoot, *The Law of Contract* (7th Ed, Butterworths, London, 1969), p v. Interestingly, this also marks the first reference in the Preface to the Australian and New Zealand editions of this work (as to which see also above, n 26); the learned authors stated (at p vi) thus: ‘We wish especially to thank the editors of the Australian and New Zealand editions of our book who have taught us so much.’
\(^{31}\) See Cheshire & Fifoot, above, n 27, p v.
\(^{32}\) Chapter 66.
\(^{35}\) See Furmston, above, n 34, p v.
It was one summer evening in Chipping Campden in 1965 that it was first suggested to me that I might like to collaborate in the editing of this work. Fortunately eleven years and two editions passed by before I was called upon to play more than a minor role and this is the first edition to appear without the active participation of the authors. I had originally hoped that Cecil Fifoot would oversee my work but his untimely death in January 1975 made this impossible. I have been greatly fortified, however, by his aid and advice in the past and by the continuing encouragement of Geoffrey Cheshire. Their imprint remains, of course, firmly on the book and its continuing merits are theirs. All errors and infelicities are mine alone.

But Professor Furmston did not seek to consciously limit his role as the new editor of this famous work. And rightly so. However, as with all new hands, wisdom (including a sense of balance) was also necessary. Professor Furmston demonstrated – in no uncertain terms – his acute understanding of how he should proceed in this new (and important) capacity in the following words:

One who essays to edit another’s book has, no doubt, to steer between the Scylla of publishing one’s own work under another’s name and the Charybdis of excessive respect for the ipsissima verba of the original text. Critics may judge to which side the rudder has lent but the moment seemed appropriate for an anxious scrutiny of the whole text. It was soon clear to me that the historical introduction needed extensive revision and even more clear that I was incompetent to undertake it. I was exceptionally fortunate therefore that my former colleague Brian Simpson, now Professor of Law in the University of Kent at Canterbury agreed to undertake this task.

Professor Furmston then proceeded to elaborate upon the changes he had undertaken vis-à-vis this particular edition:

The most obvious change in the work is in the chapter on The Contents of The Contract which has been completely recast. Substantial rewriting has also taken place in the chapters on Agreement, Consideration, Unenforceable Contracts and Privity of Contract. A good deal of new material has been introduced but it has been possible to restrict the increase in the text to six pages by leaving out some of the detailed discussion of implied terms in contracts of sale and hire-purchase and by removing some material now largely of historical interest, especially on the formalities for corporate contracts at common law and on the capacity of married women to contract.

One can discern, right from the outset, the practical approach which is a hallmark of Professor Furmston’s scholarship – an approach which is simultaneously accompanied by a humility that is rare as it is precious in academic circles. In particular, he has never shied away from taking whatever steps are necessary to improve a particular piece of scholarship. More importantly, perhaps, he has also never shied away from enlisting assistance from other legal scholars if,

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36 See Furmston, above, n 34, p v (emphasis in italics in the original text; emphasis added in bold italics).
37 See Furmston, above, n 34, p v.
in his view, to do would be to improve the work concerned. This is an excellent illustration; indeed, the late Professor A W B Simpson was an excellent legal historian whose contributions to the historical introduction of the book over the years were invaluable. Such an attitude demonstrates, in my view, a humility that is all too rare in the academic world. Indeed, the final part of this Preface epitomises this attitude as well inasmuch as it contains a number of acknowledgments – including one to Professor William Bishop with whom he would (together with Professor Hugh Beale) later co-author a leading contract casebook (which I will refer to briefly below 38). There is also a reference to what would become a significant (and even expected) personal feature of the Preface of each succeeding edition – an update on his family. This would furnish each edition with a personal touch which is rare (or even non-existent) in other legal works. In this particular edition, Professor Furmston expressed his gratitude ‘to my five daughters for allowing me to work on many Sundays during the last year and to my wife but for whose encouragement the conclusion of the work would not have been possible’. 39

The following (the tenth) edition was published five years later (in 1981). By this time, the last link to the original authors was finally gone. In the Preface to this edition, Professor Furmston observed thus: 40

Geoffrey Cheshire died in October 1978. His death marked the end of direct involvement, even by way of encouragement, of the authors in the continued editing of this work, though in content and style it remains predominantly theirs. A preface is not the place for an obituary but I may be permitted to record my abiding gratitude for the exceptional kindness consistently shown me by both authors.

Professor Furmston continued to make substantive improvements to the work as a whole, first, by way of very practical considerations; again, in his words: 41

There are major changes in the appearance of this edition with the disappearance of the side notes and the abandonment of the division of the book into parts. The decision to make these changes was dictated by a desire to mitigate the ever-increasing costs of production, and in combination they have saved perhaps as many as ninety pages.

Secondly, there were substantive changes to the text as well: 42

The most important change in the law of contract since the ninth edition is undoubtedly the enactment of the Unfair Contract Terms Act 1977 and this has required extensive discussion. There have also been a number of House of Lords decisions of particular importance, such as Photo Production v

38 See below, n 94.
39 See Furmston, above, n 34, p vi.
41 See Furmston, above, n 40, p v.
42 See Furmston, above, n 40, p v.
Securicor Transport; 43 Johnson v Agnew 44 and National Carriers v Panalpina 45 (the last of which vindicated the view adopted in the ninth edition that the doctrine of frustration should be applicable to leases). The incorporation of such new material has been the primary task of this edition but I have also tried to keep under anxious review the whole fabric of the work. The most obvious results of this will be found in chapter 2 (some factors affecting modern contract law) and chapter 18 (performance and breach). The first attempts to draw attention to a number of themes which underlie many modern developments in the subject. The second arises from my view that the complex rules about the effects of performance and breach are best understood if they are considered together.

The importance of the (UK) Unfair Contract Terms Act 1977 46 is obvious, 47 as were the House of Lords decisions referred to. What, in my view, represented a real innovation in so far as this particular work in general and this edition in particular are concerned is the (new) second chapter which Professor Furmston included in relation to some factors affecting modern contract law. This represented a tangible as well as significant acknowledgment of the extremely important need to eschew a merely technical rule-bound view of the law of contract.

There are the (expected) acknowledgments – this time extended (unusually for any textbook, let alone a leading one) to the ‘many correspondents from all over the world, who have written to point out mistakes or to query debateable propositions’. 48 Equally significant in this regard, perhaps, is Professor Furmston’s expression of thanks to ‘a number of reviewers of the ninth edition for their careful and thought-provoking comments’ and to ‘many colleagues and students for discussions which have illuminated dark corners’. 49 There are specific thanks as well to various persons (including, not surprisingly, Professor Simpson ‘for revising his historical introduction’ 50 and also to Alex Alstead with regard to his assistance on competition law). And there (once again) is that personal reference to his family, as follows: 51

My greatest debts are to my publishers and my family. ... My children (who have increased in number from five to nine since the last edition) have borne my frequent disappearances into my study at weekends and in the evenings with remarkable fortitude, and my wife has provided that measure of encouragement without which the work would not have been completed at all.

46 Chapter 50.
47 This Act is also applicable in, inter alia, Singapore pursuant to Part II of the First Schedule of the Application of English Law Act (Cap 7A, 1994 Rev Ed) (read with s 4 of that same Act). This Act has since been reprinted and allocated a local chapter number in the Singapore context (as the Unfair Contract Terms Act (Cap 39, 1994 Rev Ed)).
48 See Furmston, above, n 40, p v.
49 See Furmston, above, n 40, p v.
50 See Furmston, above, n 40, p v.
51 See Furmston, above, n 40, p v.
The next (the eleventh) edition (published in 1986), is another significant milestone: as mentioned above, the title of the book itself was changed for the first time in over four decades to include Professor Furmston’s name as well;\textsuperscript{52} Cheshire and Fifoot’s Law of Contract would hereafter be known as Cheshire, Fifoot and Furmston’s Law of Contract. This is also reflected in the very first words of the Preface, as follows:\textsuperscript{53}

1986 is the hundredth anniversary of Geoffrey Cheshire’s birth. It is perhaps sufficient to notice that it finds in print textbooks bearing his name and dealing with three of the most intellectually challenging topics in English law. \textit{1986 is also the 21st birthday of my own involvement with this work (see the Preface to the 9th edition). I am grateful to the Publishers for marking my majority by promotion to the title.}

And, consistently with the approach adopted in previous editions, Professor Furmston also stated that ‘[i]n addition to incorporating new material\textsuperscript{54} I try in each edition to look again at some section of the book’ and that ‘[i]n this edition I have attempted a significant reconsideration of the discussion of remedies’\textsuperscript{55}

There are also the traditional thanks to various persons as well as categories of persons (including, once again, ‘many generations of students who have patiently listened to half-baked versions of what ultimately emerged in the text and correspondents from all over the world who wrote to point out errors or debatable propositions’\textsuperscript{56} as well as to Professor Simpson ‘for revising his historical introduction’\textsuperscript{57} and, once again, Alex Alstead with regard to competition law). There is also a reference to the then (recently published) first edition of the casebook\textsuperscript{58} which he had co-authored with Professor Hugh Beale and Professor William Bishop.\textsuperscript{59} As importantly, perhaps, is Professor Furmston’s now traditional update with regard to his family, as follows (significantly, with an express acknowledgment for the first time of the interest in updates on his family):\textsuperscript{60}

\begin{quote}
Until I become the editor of this work I thought that only reviewers read prefaces. \textit{Then I found complete strangers asking after my family}. I ought not to fail to report therefore the birth of my tenth child, Timothy, in January 1983. He and his brothers and sisters and above all my wife have been a constant support.
\end{quote}


\textsuperscript{53} See Furmston, above, n 52, p v (emphasis added).

\textsuperscript{54} In fact, sixteen House of Lords decisions were cited in the Preface: see Furmston, above, n 52, p v.

\textsuperscript{55} See Furmston, above, n 52, p v.

\textsuperscript{56} See Furmston, above, n 52, p v.

\textsuperscript{57} See Furmston, above, n 52, p v.


\textsuperscript{59} See Furmston, above, n 52, p v.

\textsuperscript{60} See Furmston, above, n 52, p v (emphasis added).
The Preface for the next edition (the twelfth, published in 1991) is more contemplative in nature.\textsuperscript{61}

An author who departs for Rome with five hundred pages of proofs and a stern injunction from his publisher not to return without a preface is inevitably reminded of the final sentence of Gibbon’s great work penned at Lausanne in June 1787, ‘It was among the ruins of the Capitol that I first conceived the idea of a work which has amused and exercised near twenty years of my life, and which, however inadequate to my own wishes, I finally deliver to the curiosity and candour of the public.’

A daily walk across the Capitol serves to remind one of how much and how little has changed. Contemplation of the progress of English contract law over the last five years has much the same effect. There have been significant case law developments in many areas ... In addition Parliament has intervened by the Minors Contracts Act 1987; the Law of Property (Miscellaneous Provisions) Act 1987 and the Companies Act 1989.

There follows the customary expression of gratitude to students as well as audiences at lectures in many parts of the world as well as to, \textit{inter alia}, Professor Simpson for the revision of the historical introduction as well as (once again as well) Alex Alstead with respect to competition law. That pertaining to the family is more general this time (albeit no less warm and enthusiastic).\textsuperscript{62}

My wife and children continue to be my staunchest supporters. My gratitude to them is no less total because inarticulately expressed.

The next edition (the thirteenth, published in 1996) sees the Preface composed in Singapore instead – in the summer of 1996 to be precise.\textsuperscript{63} Professor Furmston eloquently observes thus:\textsuperscript{64}

[F]or those who know and love these two great cities\textsuperscript{65} (since both visits were professionally connected with the English law of contract), it perhaps serves as a metaphor both for the continuing conceptual strength of English contract law and for its capacity for adaptation to rapid change.

He then refers to twenty decisions of the House of Lords or the Privy Council before proceeding to draw the reader’s attention to the significance of this particular edition thus:\textsuperscript{66}

\textit{This edition marks the 50th anniversary of the first edition. It is appropriate, therefore, to renew my public thanks to the original authors, both for}

\begin{footnotesize}
\begin{enumerate}
\item See Furmston, above, n 61, p v.
\item See Furmston, above, n 63, p v.
\item This was a reference to Rome (where the \textit{Preface} for the previous edition was composed) and to Singapore (where the \textit{Preface} for this particular edition was composed).
\item See Furmston, above, n 63, p v (emphasis added).
\end{enumerate}
\end{footnotesize}
entrusting their work to me and for their kindness during our collaboration in various guises between 1965 and 1978. I should also record our gratitude to the late Alex Alstead, who guided the three of us through the minefield of competition law over many editions. I continue to be grateful to lecture audiences around the world who have listened to earlier versions of some of the accounts of the new cases contained in these pages and to correspondents who write to point out mistakes or infelicities.

And there is, finally, a significant update on the family front, as follows.\textsuperscript{67}

It was one of the pleasant features of earlier editions that one met people in distant parts of the world who were well informed about the size of one’s family. I should report, therefore, that since the last edition the ten children have been joined by three grandchildren. Granted the anti-social nature of the writing process, all my family and especially my wife, have provided stoic support for which I am very grateful.

The next edition (the fourteenth, published in 2001) commences with an update on the passage of the UK Contract (Rights of Third Parties) Act 1999\textsuperscript{68} as well as a reference to recent significant case law. There is also a reference to the re-organisation of the material pertaining to competition law, together with an acknowledgment of the assistance in this particular regard by Brenda Sufrin. Of interest on the personal front is the following update.\textsuperscript{69}

My wife, my ten children and my four grandchildren have all in different ways provided support, encouragement and patience in the face of anti-social absences.

The next edition (the fifteenth, published in 2007) saw a change in publisher. Not surprisingly, therefore, Professor Furmston refers to this right at the outset of the Preface.\textsuperscript{70}

The first edition of this book was published in 1945, and over the following 60 years a further thirteen editions were published by Butterworths. This is the first edition of the book to be published by Oxford University Press, and all those concerned with the production of the edition have been friendly, courteous, and extremely helpful.

There follows a reference to some important decisions as well as to UNIDROIT Principles for International Commercial Law and the Principles of European Contract Law. However, the main change was the deletion of the chapter on quasi-contracts. As Professor Furmston explained:\textsuperscript{71}

\textsuperscript{67} See Furmston, above, n 63, p v (emphasis added).
\textsuperscript{68} Chapter 31.
\textsuperscript{69} See Furmston, above, n 63, p v.
\textsuperscript{70} See M P Furmston, Cheshire, Fifoot and Furmston’s Law of Contract (15\textsuperscript{th} Ed, Oxford University Press, 2007), p v.
\textsuperscript{71} See Furmston, above, n 70, p v (emphasis added).
This [the chapter on quasi-contracts] was entirely appropriate in 1945 *but now that restitution is clearly a subject in its own right, much of which falls outside the boundaries of the law of contract, it seems an anachronism.* Questions along the boundary between contract and restitution continue of course to receive attention in the text.

The observation just quoted is indeed both timely as well as perceptive. That is why, whilst not wanting to delete the chapter on quasi-contract in the Singapore and Malaysian edition of this work (it was, I felt, too drastic an approach to contemplate, at least at that particular point in time, *viz*, 1998), I nevertheless added a section referring to the law of restitution.\(^\text{72}\) Returning to *this* edition (*viz*, the fifteenth edition), we also note the continued assistance of Professor Brenda Sufrin in relation to competition law. Finally, there is, once again, the customary personal note, as follows: \(^\text{73}\)

My wife, my ten children and my five grandchildren continue to provide support, encouragement, and patience as have new generations of students around the world to whom I have tried to explain the problems which are discussed in the text.

Finally, we come to the latest (sixteenth) edition, which was published recently (in 2012). Professor Furmston commenced by noting that the six years since this and previous (fifteenth) edition was published was ‘the longest gap in the history of the book and was due principally to the demands of a return to full-time teaching and administration’. I am sure that many of the participants at the present Conference (held at the Singapore Management University) will understand the meaning as well as context of this reference as Professor Furmston was, as already mentioned, the founding Dean of the School of Law of the Singapore Management University and had only recently stepped down from this weighty and responsible post. However, this *Preface* was also a sad occasion; as Professor Furmston observed: \(^\text{74}\)

For me a major event since the last edition has been the death of Brian Simpson before he was able to review Chapter 1. Brian and I were colleagues at Oxford long ago and indeed for several years we and our families shared the same house. He will be greatly missed. Professor David Ibbetson has kindly reviewed the text of this chapter.

As was the case with the previous two editions, Professor Sufrin has continued to review the materials on competition law. And, as before, Professor Furmston paid tribute to his wife, children and grandchildren who, in his words, ‘continue to display remarkable patience and tolerance’.\(^\text{75}\)

This brings us up-to-date with the latest edition of *Cheshire, Fifoot and Furmston’s Law of Contract*. I would like to pause here for more than a moment

\(^{72}\) See Phang, above, n 70, pp 1137–1138.

\(^{73}\) See Furmston, above, n 70, p v.


\(^{75}\) See Furmston, above, n 74, p v.
and reflect a little more on the nature of textbooks in general and how these resulting reflections prompt us to truly appreciate what we have always taken for granted and which (as I will observe in a moment) even appears to have become (shamefully and erroneously, in my view at least) underappreciated (especially nowadays, and (thankfully) in only some quarters only).

I can do no better than to refer to the following observations I made in the Preface to a recent book on the Singapore law of contract, of which I was the General Editor.76

All of my co-authors have already published in the best international legal journals. But that alone is not enough. To be able to paint – even exquisitely – on tiny portions of the canvass is commendable. However, to be able to both analyse and synthesise the relevant legal material as well as to place it intelligently, creatively as well as intelligibly on the entire canvass itself is even more commendable.

This is not to deprecate perceptive articles, comments as well as essays. They, too, are the staple diet of the legal scholar. However, having had close to twenty three years of experience in legal academia, it seems to me that it is much more difficult to write a good textbook than a good article (or even a number of good articles for that matter). Hence, the view expressed in some quarters (which I hope is in a minority) that a textbook is merely a trade publication is one that is not only misconceived but is also patently unfair. The legal scholar’s task is to both analyse as well as synthesise.77 Articles and comments tend to focus on the former and a textbook on the latter. However, the best textbooks are not a mere collection of cases and statutes. On the contrary, an excellent textbook requires sifting the wheat from the chaff and, when thousands of cases are involved, this is itself a task requiring the utmost skill and perseverance. To then translate the materials thus sifted into a coherent and integrated narrative is task requiring even more skill and perseverance. Finally, to ensure that creative commentary as well as queries are inserted in the appropriate parts of the text is not only to ensure that the textbook is hearty legal fare but also a delicious one and is a task which requires one to already have had the experience of writing perceptive articles and comments in law journals in the first place. Even then, the task is not an easy one at all because, by its very nature, a textbook requires economy of expression. In contrast, a lengthy article (even one of the highest scholarship) does not. There are, of course, textbooks of questionable qualities. But I am talking about excellent textbooks, such as Cheshire, Fifoot and Furmston’s Law of Contract itself.

And an excellent textbook enriches the understanding and stirs the reflective as well as creative juices not only of courts and lawyers but also students. The audience is a very broad one. Indeed, given the very nature and development of the common law in general and the common law of contract in particular, textbooks are an essential part of the student’s curriculum and the lawyer’s legal armoury. As I

have alluded to above, textbooks are, in the main, works of synthesis, although, as also pointed out above, they contain elements of analysis as well at appropriate junctures in the work concerned. With respect, those who deprecate the writing of textbooks often have their heads stuck in the clouds. However, as I have observed elsewhere (and in an actual case at that):  

Shorn of their theoretical roots, the relevant rules and principles will become ossified. On the other hand, if one stays only in the rarefied atmosphere of “high theory”, the danger of collapsing for the want of the “oxygen” of practical reality is not only possible; it would be imminent.

Indeed, as I proceed to observe in that case, the relationship between theory and practice is an interactive one. But this, you will recall, is precisely one of the main themes of this essay. More importantly, applying what I have just said to what is probably Professor Furmston’s most famous work, he has ensured that Cheshire, Fifoot and Furmston’s Law of Contract continues to achieve that balance between theory and practice. It is a work that is (if I may say so) brilliantly displayed across the entire canvass – deeply textured as a result of meticulous craftsmanship. In the circumstances, this work alone would have justified Professor Furmston’s status as one of the most outstanding contract scholars in the common law world. As I have already mentioned, however, this is just one of his many works. But it does stand tall as a model which every aspiring textbook writer (particularly in the law of contract) ought to strive to emulate.

As I mentioned right at the outset of this essay, I and many of my classmates chose this particular book as our text precisely because it not only synthesised the law in an excellent fashion but also contained critical analysis which prompted further reflection as well as a desire to read further. Hence, I had no hesitation suggesting to Butterworths Singapore that a local version of this textbook might be appropriate. That suggestion was enthusiastically embraced and, before I knew it, I had expanded the scope of this project to include the Malaysian cases as well as the Malaysian Contracts and Specific Relief Acts. Little did I know what awaited me. To cut a fairly long story short, I had not only to meticulously analyse the relevant legislation but had also to wade through literally thousands of Singapore and Malaysian cases touching on the law of contract. I should add that analysing the Malaysian Contracts Act (which is, of course, based on the Indian Contract Act) was particularly challenging, although the few commentaries that existed did assist me as well. Indeed, the Malaysian Contracts Act is an excellent resource from which much direct as well as comparative legal scholarship can (and ought to be) written. But that is another story for another time. To return to this particular project, in 1991 (during a sabbatical year), I visited Professor Furmston at the University of Bristol. His hospitality and assistance then and right through to the

78 See the Singapore High Court decision of Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric (practising under the name and style of W P Architects) [2007] 1 SLR 853 (reversed, Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric [2007] 3 SLR 782, but without considering this particular point) at [41].
79 See the Contracts Act 1950 (Act 136; Rev 1974) and the Specific Relief Act 1950 (Act 137; Rev 1974).
fruition of the project (and, I might add, to this day) has been impeccable. It made what was already an arduous project a much more bearable one. The project ultimately came to fruition with the first edition, which was published in 1994. A second edition was published in 1998. In the meantime, the material had become so enormous that I felt compelled to produce a shorter student’s text, also published that same year.

But I am digressing. We ought, at this juncture, to turn to consider the other books which have been authored, co-authored and/or edited by Professor Furmston.

More books

As already mentioned, Professor Furmston also edited and/or authored or co-authored a fair number of other books. Perhaps the most significant is one which Professor Furmston is both General Editor of, and contributor to, is The Law of Contract – an important volume in the Butterworths Common Law Series. Indeed, this book brings together some of the foremost contract scholars in the common law world. It is a veritable tour de force in relation to the exposition of contract law for practitioners, weighing in at almost two thousand pages of text (sans preliminary pages and tables) and is a more than worthy ‘competitor’ to the first volume of Chitty on Contracts.

Another important book (co-authored with Professor G J Tolhurst and with Assistant Professor Eliza Mik as a specialist contributor on the important topic of the formation of online contracts) is Contract Formation – Law and Practice. Although it is a new book, Professor Furmston generously acknowledges the debt owed to its predecessor. In the present writer’s view at least, this particular book is timely for several reasons.

Contrary to the popular perception in some quarters at least, the law relating to contract formation is not useful merely for introducing law students to the practice of legal analysis. As the authors themselves point out, right at the outset of the book, ‘[i]t would … come as a surprise to many to learn that perhaps the most

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84 Presently in its Fourth Edition (2010), with the First Edition being published in 1999; see also above, n 2.
86 Published by Oxford University Press in 2010. Assistant Professor Mik’s contribution is to be found at Ch 6.
87 See the Preface to M Furmston and G Tolhurst (Contributor: E Mik), Contract Formation – Law and Practice (Oxford University Press, 2010), p v. The predecessor work was M Furmston, T Norisada & J Poole, Contract Formation and Letters of Intent (John Wiley & Sons, 1997). Indeed, in the Preface to this particular book, Professor Furmston informs the reader that Professor Jill Poole, one of the authors of the predecessor book, was supposed to co-author this book with him but was ultimately unable to do so because of her other commitments. Professor Tolhurst, we are told, willingly ‘[stepped] into the breach’.
litigated area of contract law is that of formation’. In Singapore at least, the Court of Appeal has heard a number of significant cases over the last few years in the context of contract formation. For example, the court has released a judgment in which the finding of a fresh (and independent) contract formed the basis of its decision. The court has also considered – in some detail – the formation of compromise agreements and the nature of (as well as possible alternatives to) the doctrine of consideration. There is also a more recent decision in relation to the doctrine of past consideration and the exception to the rule against past consideration.

Secondly, as the authors also point out, the common law is no longer a monolithic entity. Different jurisdictions might adopt a different (or modified) approach to issues of (here) contract formation. As the task of the court is, I believe, to decide on the best available principles, courts ought to (and, in fact, do) have regard to developments in other jurisdictions. This book is particularly helpful inasmuch as it assembles, in one venue, all the major cases from the various jurisdictions. I also noticed the copious (and helpful) reference to academic works as well (for example, on the topic of objectivity in contract, in one footnote alone, there is a reference to no fewer than nine pieces of academic literature (including three US works)).

Finally (and in a related vein), principles from the civil law are considered as well – in the form of references to, for example, the Vienna Convention, the Unidroit Principles as well as the principles of European Contract Law.

Yet another important book which I have briefly mentioned above is the casebook on contract law co-authored by Professor Furmston, Professor H G Beale and Professor W D Bishop – Contract – Cases and Materials. This casebook is an innovative one. In addition to canvassing the main decisions and statutory provisions as well as furnishing relevant notes and asking perceptive questions of the reader (all par for the course insofar as contract casebooks are concerned), this work goes further by, inter alia also focusing on the relationship between contract and other legal categories (in particular, restitution and tort) as well as by furnishing the reader with extracts from actual contracts and with readings on the economic analysis of contract law as well as other interesting empirical work.

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88 See Furmston & Tolhurst, above, n 87, p 1.
89 See Ang Sin Hock v Khoo Eng Lim [2010] 3 SLR 179.
92 See also A Phang, ‘Recent Developments in Singapore Contract Law – the Search for Principle’ (2011) 28 JCL 3.
93 See Carter & Tolhurst, above, n 87, p 2, n 2.
In addition to authoring a book on the sale and supply of goods, 95 Professor Furmston also recently co-edited (as well as contributed to) a book on commercial and consumer law. 96

Finally, as already alluded to above, Professor Furmston is also an expert in construction law. In this regard, it is pertinent to note that the latest edition of Powell-Smith and Furmston’s Building Contract Casebook was recently published. 97 Professor Furmston is, of course, also the editor of the Construction Law Reports, which we will consider briefly below. 98

There are yet other books as well, but these seem to me to be the most significant. Let us now turn to a brief survey of Professor Furmston’s articles, comments and essays.

Articles, Comments and Essays

Introduction

I have a confession to make. I had wanted to read each and every article, comment and essay which Professor Furmston had written. However, there were logistical as well as personal difficulties which rendered this unfeasible. On the logistical side, I could not obtain copies of every work which itself bears testimony to the vast variety of journals as well as books which Professor Furmston has contributed to over the last half a century or so. On the personal side, I must state that the workload at the courts also made it impossible to read (at least in the detail I would have liked) even those publications which I was able to obtain. So all I can offer is a sampling of sorts.

The Diversity

Before actually looking at some actual publications, it is important, in my view, to reiterate a point I had made at the outset of the present essay – the enormous diversity which characterises Professor Furmston’s various writings. However, as this essay is being written in the context of a conference on contract law, I will necessarily be brief.

A brief survey of Professor Furmston’s early writings reveals an uncanny variety and diversity of areas covered. These range from a survey as well as analysis of (then) recent decisions involving the issue of recognition of polygamous marriages 99 to the law relating to the doctrine of ultra vires 100 (although, in this last-

98 See the text to nn 188–190, below.
mentioned regard, there is an overlap with the law of contract, as evidenced by yet another piece\textsuperscript{101}. But his interest in variety (and, more importantly, the ability to master a great many areas of law) was not merely, it seems, the product of the enthusiasm of youth but is the product, rather, of a considerable intellect (as well as intellectual curiosity) which refuses to be confined to a limited area (which is, unfortunately, common in much academic discourse both past as well as present). In his inaugural lecture delivered before the University of Bristol on 1 February 1979, for example, Professor Furmston touched on the extremely important as well as relevant topic concerning ignorance of the law.\textsuperscript{102} Significantly, perhaps, it was also published in the inaugural issue of the new series of the influential journal of the Society of Legal Scholars (formerly the Society of Public Teachers of Law), entitled \textit{Legal Studies}. Although this particular lecture does not deal (in the main at least) with contract law as such, it embodies all the qualities which constitute what is best in Professor Furmston’s legal scholarship in general and his contract scholarship in particular – \textit{inter alia}, his broad theoretical and practical vision (including the ability to take into account the extralegal context) as well as the ability to suggest equally sound theoretical as well as practical solutions to the problem at hand. There are other examples as well – for example, pieces in relation to the law of bankers’ commercial credits,\textsuperscript{103} arbitration,\textsuperscript{104} construction law,\textsuperscript{105} shipping law,\textsuperscript{106} and, of course, that other important branch of the law of obligations, the law of tort.\textsuperscript{107}

One other general point may be made at this particular juncture: Professor Furmston has never shied away from lending his considerable expertise to joint projects. As we have seen (with regard to my own experience), and will see, this is evident in the great many joint publications he has been involved in. This is, I might add, a rare quality in the sphere of legal academia and, indeed, in any other aspect of life for that matter.

\textsuperscript{103} See M P Furmston, ‘An Introduction to Bankers’ Commercial Credits’ (1991) 2 ICCLR 91.
\textsuperscript{106} See M P Furmston, ‘Cancellation clauses and repudiatory breach’ in Ch 15 of D R Thomas (Ed), \textit{The Evolving Law and Practice of Voyage Charterparties} (Informa, London, 2009).
Let us turn now to a sampling of the many learned articles, comments and essays published by Professor Furmston in the context of contract law. Constraints of space preclude an in-depth analysis and I therefore propose to conduct only the most general of surveys of Professor Furmston’s scholarship in the law of contract, with a focus on his work in the area of illegality and public policy, whilst commenting even more briefly on his work in the areas of discharge by breach, privity of contract, good faith and comparative contract law.

A Sampling

A Preliminary Point – ‘Intra-Diversity’

A preliminary point might be apposite: Professor Furmston’s scholarship in terms of his articles, comments and essays covers virtually every area of the law of contract and, to this extent, the diversity just referred to extends to a kind of ‘intra-diversity’ within contract law as well. This is not surprising, given his mastery of the subject and its subsequent translation into general texts such as Cheshire, Fifoot and Furmston’s Law of Contract. This was evident right from the outset of his academic career (many of these pieces were in fact published in the prestigious Modern Law Review). We find, in particular, a number of perceptive notes and comments on various decisions in the context of, for example, damages,108 infants’ contracts,109 frustration (and quantum meruit),110 the legal position in relation to the issue of performance following repudiation in the context of actions for a fixed sum,111 the issue of minimum payments and penalties in the hire purchase context,112 the classification of terms,113 as well as the doctrine of restraint of trade,114 amongst many others. Articles published later in his illustrious career include thoughtful overviews115 as well as perceptive pieces on relief against forfeiture after breach of an essential time stipulation,116 damages,117 frustration,118 umbrella agreements,119 as well as on letters of intent.120

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113 See M P Furmston, ‘The Classification of Contractual Terms’ (1962) 25 MLR 584 (a then contemporary comment on the seminal Court of Appeal decision of Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26; see also below, n 172).
114 See Furmston, above, n 18.
Let me now turn – in the briefest of fashions – to some specific topics, commencing with that most confused (and confusing) of topics, viz, illegality and public policy.

Illegality and Public Policy

(1) Introduction

Of all the doctrines of the law of contract, perhaps that relating to illegality and public policy is the most problematic. This is not perhaps surprising in view of the nature of the subject matter involved. In this regard, clear analyses are of the first importance but, because of the difficulties just mentioned, are in short supply. Professor Furmston is one of the rare contract scholars to have tackled various issues in relation to illegality and public policy in a manner that is refreshing as it is illuminating. Indeed, one of his (perhaps the) best known articles on this topic was published in 1966 in The University of Toronto Law Journal.121 In my view at least, this article is a remarkable one, and especially so given that it was published almost half a century ago. In particular, it clarifies not just one or two – but several – difficult issues in the context of this very difficult and complex topic. It also demonstrates an excellent balance between having a sound overarching organisational framework on the one hand and dealing with discrete points within that particular framework on the other. This is all the more – if I may say so – commendable in light of the extremely ‘slippery’ nature of the topic itself. Indeed, nobody is ever confidently – let alone absolutely – sure of how to deal with the very amorphous nature inherent within the concept of public policy. 122 As


122 As Burrough J put it in his oft-cited observations in the English decision of Richardson v Mellish (1824) 2 Bing 229 at 252, public policy is ‘a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law’. And, in the House of Lords decision of Janson v Driefontein Mines Ltd [1902] AC 484 at 500, Lord Davey expressed the view that ‘[p]ublic policy is always an unsafe and treacherous ground for legal decision’. Not surprisingly, therefore, Judge John Mowbray QC, in the English High Court decision of Sutton v Sutton [1984] Ch 184, remarked (at 195) that ‘[h]e mounted the unruly horse of public policy with trepidation’. Reference may also be made to the observation of Lord Pearce in the House of Lords decision of Esso Petroleum Co Ltd v Harper’s Garage (Stourport) Ltd [1968] AC 269, where the learned law lord was of the view (at 324) that ‘[p]ublic policy, like other unruly horses is apt to change its stance’. And Sachs LJ, in the English Court of Appeal decision of Shaw v Groom [1970] 2
Professor Furmston points out right at the outset of the article, ‘[s]o far ... academic attention has tended to concentrate on the effect of illegality to the neglect of the question whether a given contract is illegal’. 123 This extremely perceptive observation – made so very many decades ago – still holds good, in the main, today. Indeed, whilst there are still difficulties with the issue of the effect of illegality, the difficulties with respect to the prior issue as to whether or not there has been illegality of the type which would render the contract void in the first place are equally – if not more – vexing. Perhaps a brief elaboration in order to furnish the reader with a clearer idea of the magnitude of the difficulty and complexity of this particular area of contract law is in order.

(2) The Tangled Web of the Law relating to Illegality

The two primary problems in the law relating to illegality consist, first, in the question as to when there is an illegality which renders the contract concerned void and, secondly, the legal effect of illegality.

The (first) problem as to when there is an illegality which renders the contract concerned void is perhaps best illustrated by reference to the topic of statutory illegality. A key point of confusion has, in my view, centred around the distinction between the category of ‘contracts illegal as formed’ and that of ‘contracts illegal as performed’. With respect (and for reasons which I have elaborated upon elsewhere 124), I think that this particular distinction is apt to confuse, particularly where the implied prohibition of contracts via statute is concerned. Indeed, situations of express (statutory) prohibition necessarily fall within the former category (viz ‘contracts illegal as formed’) since it is clear that the statute concerned prohibits, by virtue of its plain language, the very formation of the contract itself. However, situations relating to implied (statutory) prohibition are (potentially at least) more problematic. Put simply, the concept of illegal performance may lead one from the key question at hand, viz, is the contract (impliedly) prohibited by the statute concerned? In a very general sense, there would necessarily have to be some form of illegal performance (in the sense of illegal conduct) to begin with before the issue of illegality can even be raised. However, such illegal conduct does not necessarily, in and of itself, entail that the contract is prohibited. If, indeed, it is the contract that is intended by the statute concerned to be (here, impliedly) prohibited, then would it not be the case that the

QB 504, observed thus (at 523): ‘Public policy has been often spoken of as an unruly horse: all the more reason then why its riders should not themselves in these changing times wear blinkers, be oblivious to the scene around, and thus ride for a fall. Sound policy must be flexible enough to take into account the circumstances of its own generation.’ Lord Denning MR, on the other hand, adopted a far more optimistic approach, observing, in Enderby Town FC Ltd v The Football Association Ltd [1971] Ch 591 thus (at 606): ‘With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles.’ See also generally P H Winfield, ‘Public Policy in the English Common Law’ (1928–1929) 42 Harvard L Rev 76; W Gellhorn ‘Contracts and Public Policy’ (1935) 35 Columbia L Rev 679; D Lloyd Public Policy—A Comparative Study in English and French Law (University of London, Athlone Press, 1953); J Shand ‘Unblinking the Unruly Horse: Public Policy in the Law of Contract’ [1972A] CLJ 144; C R Symmons, ‘The Function and Effect of Public Policy in Contemporary Common Law’ (1977) 51 ALJ 185; and R A Buckley Illegality and Public Policy (Sweet and Maxwell, 2nd Ed, 2009) at Ch 6.

123 Furmston, above, n 121 at 267 (emphasis added).

statutory contravention has in fact struck (in substance) at the very root of the contract itself? If so, would this not, in substance and effect, be a situation in relation to a contract which is illegal as formed? As I have sought to argue elsewhere, such an approach (which focuses essentially on the rubric of formation) is in fact supported by the judgment of Devlin J (as he then was) in the leading English High Court decision of St John Shipping Corporation v Joseph Rank Ltd.\[126\]

To complicate matters further, there is (potentially at least) a new approach towards the issue of implied (statutory) provision and which finds its source in the English Court of Appeal decision of Phoenix General Insurance Co of Greece SA v Administratia Asigurilor de Stat\[127\] – particularly in the observations by Kerr LJ\[128\] (where a distinction (which is, with respect, unsatisfactory, in my view) was drawn between bilateral and unilateral prohibitions). Again, I have sought to argue against such an approach elsewhere and will not rehearse them yet again.\[129\]

There is also the situation where there has been neither express nor implied (statutory) prohibition. I have suggested elsewhere a qualification to the general rule that, in such situations, the transaction concerned can proceed as planned – which qualification centres on what precisely was the intention of the contracting parties. Put simply, a ‘guilty party’ would not be able to enforce the contract concerned, whereas an ‘innocent party’ would.\[130\]

Turning briefly to illegality under common law, the principal difficulties are both general as well as specific.\[131\] To elaborate, insofar as general difficulties are concerned, these stem from the very fluid nature of public policy itself (a point which we have, in fact, already noted\[132\]). One major difficulty that flows from this is the indeterminacy of the various heads of public policy: what is the role of the courts in deciding whether or not to extend these heads? How should the courts modify the existing heads of public policy? This last-mentioned question raises specific difficulties peculiar to the head of public policy concerned. Again, a discussion of these various difficulties is outside the purview of the present essay. What is important is that all this underscores the need (which Professor Furmston has emphasized in his article) to attempt at least to tackle the threshold issue as to whether there has been, so to speak, an ‘operational’ illegality which renders the contract concerned void in the first place. Only then, as we have mentioned, does the issue arise as to the effect of that illegality.

Turning to the second problem, viz the effect of illegality, the possible legal categories are at least fairly clear. Put simply, the contract is void and, hence, neither party may enforce the contract. However, there may remain the opportunity to recover benefits which have hitherto passed under the contract (via a form of

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\[125\] See Phang, above, n 124, especially at paras 13.044–13.049.
\[126\] [1957] 1 QB 267, especially at 284.
\[130\] See generally Phang, above, n 124 at paras 13.051–13.055.
\[132\] See above, n 122.
restitution), although this is obviously a somewhat less preferable alternative compared to recovery under the contract itself as the full contractual loss could be recovered in this latter situation. Even so, the legal route under the former situation (viz, by way of a form of restitution) is a fairly limited one and comprises three possible avenues – (1) recovery where the parties are not in pari delicto; (2) recovery by way of an independent cause of action; and (3) possible recovery if there has been repentance or timely repudiation. Avenue (1) itself comprises three sub-categories, viz, (a) class protection statutes; (b) fraud, duress or oppression; and (c) mistake. Avenue (2) comprises two sub-categories, viz, (a) tort and (b) collateral contract. Avenue (3) stands on its own, without any sub-categories.

With this background and context in mind, let us now consider Professor Furmston’s article in order to demonstrate why it was not only ahead of its time but has also continued to stand the test of time. Indeed, as we shall see below, this article was cited by a court as recently as 2004 and 2007.

This essay is not the forum for canvassing the avenues – as well as the accompanying difficulties – relating to the effect of the doctrine of illegality and public policy – in any detail, if nothing else, because Professor Furmston’s article (as already mentioned) focuses on the first problem (viz, the threshold issue as to whether or not there has been an illegality of the type that renders the contract void to begin with). In this last-mentioned regard, there are (as alluded to above) at

134 See eg the oft-cited English decisions of Kearley v Thomson (1890) 24 QBD 742 and Shelley v Paddock [1980] 1 All ER 1009 as well as the Singapore High Court decision of Chee Jok Heng Stephanie v Chang Yue Sfoon [2010] 3 SLR 1131.
135 See eg the oft-cited English decision of Oom v Bruce (1810) 12 East 225, 104 ER 87 as well as the Singapore Court of Appeal decision of Aqua Art Pte Ltd v Goodman Development (S) Pte Ltd [2011] 2 SLR 865.
136 See eg the leading English Court of Appeal decision of Bowmakers, Ltd v Barnet Instruments, Ltd [1945] KB 65 and the later House of Lords decision of Tinsley v Milligan [1994] 1 AC 340, as well as the English Court of Appeal decision of Shelley v Paddock [1980] 1 All ER 1009. But cf the High Court of Australia decision of Nelson v Nelson (1990) 70 ALJR 47 (see also A Phang, ‘Of Illegality and Presumptions – Australian Departures and Possible Solutions’ (1996) 11 JCL 53).
137 See eg the oft-cited English Court of Appeal decision of Strongman (1945) Ltd v Sincock [1955] 3 All ER 90.
138 See eg the oft-cited English decisions of Kearley v Thomson (1890) 24 QBD 742 and Bigos v Boustead [1951] 1 All ER 92. For a more recent English decision, see the English Court of Appeal decision of Tribe v Tribe [1995] 3 WLR 913. For a further possible conceptual route towards recovery of benefits conferred under contract in equity (particularly in the context of marriage brokage contracts), see the English Court of Appeal decision of Hermann v Charlesworth [1905] 2 KB 123 as well as Phang & Goh, above, n 26 at paras 891–893.
139 See the English High Court decision of 21st Century Logistic Solutions Ltd v Madyson Ltd [2004] 2 Lloyd’s Rep 92 at [17] and [18]; see also below, nn 150 and 261.
140 See the English Court of Appeal decision of Anglo Petroleum Ltd v TFB (Mortgages) Ltd [2007] EWCA Civ 456 at [81]; see also below, nn 151 and 261.
141 See generally Phang, above, n 124 at paras 13.114–13.158. The various problems and difficulties relating to the effect of illegality and public policy include (but are not limited) to the following issues in relation to a restitutionary claim with regard to independent causes of action in both tort (see eg B Coote, ‘Another Look at Bowmakers v Barnet Instruments’ (1972) 35 MLR 38; N Enonchong, ‘Title Claims and Illegal Transactions’ (1995) 111 LQR 135; and Phang, above, n 136) and the collateral contract (see eg Phang & Goh, above, n 26 at para 886), as well as the doctrine of repentance or
least two types of (threshold) illegality, viz, illegality under statute and illegality under common law, respectively. In fairness, much of the problem in this particular regard pertains to the rather open-ended nature of the doctrine itself – a condition that is inherent within the very nature of the subject matter of the doctrine itself.

(3) The Article Proper

Returning, then, to Professor Furmston’s article, it is suggested that this very comprehensive article can be read and applied on at least two levels. The first is to apply specific parts of it which relate to discrete issues. Indeed, the article is literally packed with specific analyses of specific aspects of the law relating to illegal contracts which might furnish particular legal solutions to specific issues. Looked at in this light, it would be inappropriate to even attempt to survey all these various issues within the more modest remit of the present essay. However, as alluded to above, there is a second – and more general and conceptual – level at which this article may be read and applied. This level is at least equally important for it, inter alia, assists in clearing away the underbrush, so to speak, that bedevils this particular area of the law and, in helping the reader in achieving conceptual clarity in this otherwise hazy (and even muddled) area of the law, simultaneously aids him or her in the practical sphere of application as well. It might be apposite to illustrate this by reference to a few examples which are (I should add) by no means exhaustive and which I will also attempt to relate (as far as is possible) to some of the general issues set out above by way of background.

First, although the article focuses on illegality under the common law, Professor Furmston has also given some very important legal food for thought on the relationship between this category of illegality and the other main category, viz, statutory illegality. In particular, he points out that, in order to avoid confusing both these categories, it is important to be clear that statutory illegality involves ‘situations where a statute expressly or impliedly prohibits the making of a contract’, whereas where ‘a statute prohibits an act it is a question of common law illegality whether or not a contract to that act is illegal’. However, as he pertinently points out, there could be an overlap in analysis which involves both categories; in his words:

But if a statute prohibits an act, it may be argued that it impliedly prohibits the making of a contract to commit that act. This should mean that where we have a contract to do X and X is the subject of a statutory prohibition the Court should usually consider, first, whether the statutory prohibition impliedly prohibits the making of a contract to do X and, secondly, whether an agreement to do X is illegal on common law principles as being an agreement to commit a crime.

timely repudiation (see eg Phang & Goh, above, n 26, especially at para 890). There is also the ‘public conscience test’ which (for the time being in the law of contract at least) has been rejected under English law (and see generally eg N Enonchong, ‘Illegality: The Fading Flame of Public Policy’ (1994) 14 OJLS 295 and R A Buckley, ‘Law’s Boundaries and the Challenge of Illegality’ in Ch 9 of R A Buckley (Ed), Legal Structures – Boundary Issues Between Legal Categories (John Wiley & Sons, 1996), pp 235–237 as well as 240–241).

142 See Furmston, above, n 121 at 281 (emphasis added).
143 See Furmston, above, n 121 at 281 (emphasis added).
Secondly, Professor Furmston perceptively observes that ‘it is dangerous to think of illegal contracts as consisting wholly or even mainly of agreements to do acts contrary to the policy of the law’. In his view, ‘it is quite clear that agreements which on their face are harmless, and which can be performed without infringing any legal rule, may still be held illegal’. In illustrating this point, Professor Furmston refers, inter alia, to the much cited English Court of Appeal decision of Alexander v Rayson. In this case, there were, in the contract concerned, two separate documents, one a lease (with the benefit of certain services) at a rent of £450 per annum, the second requiring payment of £750 per annum for the provision of various services. The second document, however, covered essentially the same services as those embodied in the first document (except for the provision and maintenance of a fridge). The object of this ‘double-document arrangement’ was to reduce the amount of tax payable and thus defraud the revenue authorities. The court therefore held the agreement to be illegal and void. The facts and holding of the case are straightforward enough, but what is interesting is Professor Furmston’s point, made in the article presently being considered, to the effect that a contract may involve (as already mentioned) the doing of an act legal in itself, but with the intention that it provide the setting for the ultimate effecting of an illegal purpose. Such a transaction is thus not an illegal contract as such, although public policy requires that the transaction be treated as if the contract itself were illegal. This broad category has in fact received explicit judicial recognition in recent times by Gibbs ACJ and Jacobs J in the leading Australian High Court decision of Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd. Also (and perhaps more) to the point is Professor Furmston’s analysis of the limits of such a category; he was of the view that insofar as the contract is concerned, ‘it is clear that there must come a point when the connection with the plaintiff’s intention is too remote’. This is, of course, in essence a question of degree: when, in other words, does the link between the contract (legal in itself) and the illegal purpose it is supposed to effect become too remote? It should be noted that it was precisely this passage (and point therein) which was cited, endorsed and applied by Field J in the fairly recent English High Court decision of 21st Century Logistic Solutions Ltd v Madysen Ltd and by Toulson LJ (with whom Smith and Mummery LJJ agreed) in the even more recent English Court of Appeal decision of Anglo Petroleum Ltd v TFB (Mortgages) Limited.

There are a great many other points made in this seminal article but, from just the two points just mentioned, it is clear that Professor Furmston has done much

144 See Furmston, above, n 121 at 285.
145 See Furmston, above, n 121 at 286 (emphasis added).
146 [1936] 1 KB 169.
147 See generally Furmston, above, n 121 at 286–287 and 306–308. Reference may also be made to Alexander v Rayson itself (see [1936] 1 KB 169 at 182), the language of which contains the point that is, however, very helpfully brought to the fore by Professor Furmston’s perceptive analysis and elaboration.
148 See (1978) 139 CLR 410 at 413 and 432, respectively. See also the High Court of Australia decision of Nelson v Nelson (1955) 70 ALJR 47 at 52 and 54 (per Deane and Gummow JJ) and at 78 and 79 (per Toohey J). See further Alexander v Rayson itself, above, n 146.
149 See Furmston, above, n 121 at 287.
150 See [2004] 2 Lloyd’s Rep 92 at [17] and [18]. See also above, n 139 and below, n 261.
151 See [2007] EWCA Civ 456 at [81]. See also above, n 140 and below, n 261.
in furnishing the conceptual guidance (and ensuing clarity) which will aid in both the study, analysis as well as clarification of many problematic aspects of this very difficult area of the law of contract. It is true that there are many other difficulties (briefly set out above) which are not dealt with directly by this article. However, Professor Furmston himself is clear that his is not the last word on the topic. Indeed, as already mentioned, that it has stood the test of time (of almost fifty years) as one of the leading articles in the field is a testament to its importance and influence. Above all, Professor Furmston’s more general insistence in this article on the need to be precise in one’s analysis and classification is salutary and ought, in my view, to be constantly borne in mind (especially in this particular area of contract law which is inherently susceptible of both linguistic as well as conceptual slippage).

(4) Another Piece

There is, however, one other piece on illegality by Professor Furmston which I would like to briefly consider – not least because it does deal directly with one of the difficulties referred to above (viz, the significance (or otherwise) of the distinction between ‘contracts illegal as formed’ and ‘contracts illegal as performed’). It is a perceptive comment on an English Court of Appeal decision which, whilst handed down over five decades ago, is still a leading case which is cited in all the textbooks – Archbolds (Freightage) Ltd v S Spanglett Ltd. It was published before the article just considered but contains some valuable points which were elaborated upon in the subsequent article. Professor Furmston commences this particular piece with an insightful description of some of the basic difficulties underlying the entire law relating to illegality and public policy, as follows:

Economy in juristic concepts is useful, promoting simplicity and clarity in arrangement, but Occam’s razor can be applied too sharply, if the result is to cast too many different situations within the ambit of a single rule. The law relating to illegality in contract has been the victim of such a tendency. Until recently, this topic was formally governed by a few maxims, very widely stated and usually applied in a mechanical fashion, with little or no account taken of the policy considerations causing the law to condemn the particular contract or of how best they could be promoted. The pressure of events, particularly the vastly expanding field of state intervention with the minutiae of daily life, has compelled a reappraisal. Several commentators have pointed out the need for a more flexible approach, and for a realisation that there is not one or even two but many kinds of illegality.

His subsequent analysis of the case is equally – if not more – illuminating. It comes very close – in substance at least – to the approach which I have sought to outline briefly above, viz, that the key issue is whether or not the contract (as opposed to merely the conduct) has been prohibited. Indeed, in Archbolds

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152 See Furmston, above, n 121 at 308.
153 And see the analysis above in the text to nn 124–126.
156 See Furmston, above, n 121, especially at 396–398.
itself, there is some support for the approach I have proffered, particularly from the judgment of Devlin LJ. This is not surprising in view of Devlin LJ’s earlier judgment in *St John Shipping Corporation v Joseph Rank Ltd*, although the learned judge was, with respect, somewhat less clear and emphatic in *Archbolds (Freightage) Ltd v S Spanglett Ltd* compared to his earlier decision in *St John Shipping Corporation v Joseph Rank Ltd*.

(5) Conclusion

Finally, it should be noted that Professor Furmston has also authored other publications touching on the topic of illegality and public policy, albeit in somewhat more specific contexts. One relates to illegality in the context of banking transactions. The other, which is comparative in nature, is a powerful critique of the then recently enacted New Zealand Illegal Contracts Act 1970 and which ought, in my view, to be compulsory reading for any jurisdiction which is thinking of reforming this very thorny area of the law of contract via legislation. However, the two pieces discussed briefly above (in particular, the first) are, in my view, the most important and influential.

Discharge by Breach

The law relating discharge by breach, as I have observed elsewhere, ‘appears to be in a state of flux in many Commonwealth jurisdictions’. As I also observed, ‘the Singapore courts have developed a uniquely local set of jurisprudence and principles that seeks to cut the legal Gordian Knot in relation to the central conundrum that has cast a long legal shadow across this particular area of the common law of contract’. This ‘central conundrum’ relates to the attempt to reconcile to various tests which the courts employ in ascertaining whether or not the innocent party can elect to treat itself as discharged from the contract as a result of a breach by the other party of one or more of the terms of the contract. In this regard, there are two basic tests, *viz*, the ‘condition-warranty’ approach and the ‘*Hongkong Fir* approach’, respectively. Insofar as the latter approach is concerned, the seminal decision is that of the English Court of Appeal in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* in general and the equally seminal observations by Diplock LJ (as he then was) in that very decision in particular. Indeed, it was

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163 No 129 of 1970.
164 On the topic of reform of the law relating to illegality and public policy, see generally Phang, above, n 124 at paras 13.236–13.244.
165 See Furmston, above, n 121.
166 See Phang, above, n 92 at 11.
167 See Phang, above, n 92 at 11. See also generally at 11–15 (and the decisions cited therein).
from this particular decision that a third category of terms – in addition to ‘conditions’ and ‘warranties’ – emerged, viz, the ‘intermediate’ or ‘innominate’ term. Interestingly, as Professors Carter, Tolhurst and Peden point out in their article, ‘[t]he only hint of intermediate term is to be found in the catchwords in the Queen’s Bench report which include the expression ‘intermediate stipulation’’. More importantly, for the purposes of the present essay, the learned authors also observe that ‘[t]he innominate term expression appears to have originated in M P Furmston (1962) 25 MLR 584’. However, as another writer has pointed out, a leading textbook has attributed the origin of the expression ‘innominate term’ to a leading casebook on contract law instead. It would nevertheless appear that, as a matter of logic and timing, the honour in this particular regard ought to be given to Professor Furmston.

Privity of Contract

An oft-cited article in relation to the doctrine of privity of contract is an article published by Professor Furmston more than half a century ago in The Modern Law Review in which he explores the operation of this doctrine in relation to the question of enforcement of a benefit made in favour of a third party through the lenses of a couple of (then) recent decisions. What, however, is of special interest, in the present writer’s view, is the author’s perceptive understanding of the need to have regard to the practical consequences concerned; in his words:

In the final analysis, however, legal rules must be tested, not by logic alone, although the importance of that is not to be underestimated, but by the social consequences to which they give rise. It is submitted that rigid adherence to

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170 And for a recent decision (from the English High Court), see Wuhan Ocean Economic & Technical Cooperation Co Ltd v Schiffahrts-Gesellschaft ‘Hansa Murcia’ mbH and Co KG [2013] Lloyd’s Rep 273 at 281.
172 See Carter, Tolhurst & Peden, above, n 171 at 271. n 19. The piece by Professor Furmston was actually a comment on the Hongkong Fir case itself: see M P Furmston, ‘The Classification of Contractual Terms’ (1962) 25 MLR 584 at 586 (reference to an ‘innominate third class’ of terms; see also above, n 113).
174 This is because Professor Furmston’s piece, above, n 172 was in fact published first (it might be usefully noted that the first edition was published in 1957, the second edition was published in 1961 and the third edition was published in 1966, so that the only edition to have first coined this terminology would be the third edition, which was of course also published after Professor Furmston’s piece (the second edition presumably being published before the decision in the Hongkong Fir case had been handed down)).
175 See M P Furmston, ‘Return to Dunlop v Selfridge?’ (1960) 23 MLR 373.
177 See Furmston, above, n 175 at 376.
the doctrine of privity of contract gives rise to unsatisfactory results. First, there are a number of situations where it would seem that a person has a legitimate interest, which ought to be protected, in seeking to confer a benefit in futuro upon a third party. The most obvious example is insurance where social pressures have already compelled statutory modification of common law dogma. Secondly, the two-party contract is not an adequate tool to solve the complexities of modern commercial life, where many transactions involve a long chain or a complex web of parties.

Indeed, this practical as well as commonsensical approach towards the law in general and this particular branch of the law of contract in particular appears to have been vindicated subsequently both developments at both common law as well as statute. 179

I should also mention a couple of other (more recent) pieces which might be of interest to the reader. The first deals with the law relating to the assignment of contractual burdens. 180 The second relates to contractual promises to indemnify third party beneficiaries under the common law which was co-authored by Professor Furmston and Professor J W Carter. 181

Good Faith

The topic of good faith is an important – if controversial – one in the law of contract. In this regard, note may be taken of an important article on good faith and fairness in the negotiation of contracts which was co-authored by Professor Furmston and Professor J W Carter and published (in two parts) in the Journal of Contract Law. 182 The authors acknowledge (correctly, in my view), right at the outset, that ‘[t]he ‘good faith issue’ is both controversial and complex’. 183 However, focusing on the issue relating to the negotiation of contracts, they proceed to demonstrate – meticulously (and persuasively, in my view) – that, whilst the traditional view that there is no general duty of good faith in the bargaining process remains valid, 184 the relevant legal rules and principles (including, but not limited to, contractual rules and principles) nevertheless frequently serve to promote good faith. 185

178 See eg, in relation to exception clauses, the New Zealand Privy Council decision of New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd (The Eurymedon) [1975] AC 154 and the Australian Privy Council decision of Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd (The New York Star) [1981] 1 WLR 138.

179 See above, n 68.


185 See also M P Furmston, ‘Is there a Duty to Negotiate in Good Faith?’ (1998) 114 LQR 362 (this is a brief comment on the Federal Court of Australia decision of Hughes Aircraft Systems International v Air Services Australia (1997) 146 ALR 1; reference may also be made to A Phang, ‘Tenders,
Comparative Contract Law

The need for an understanding of law from other jurisdictions is especially imperative in light of the increased (and increasing) interconnectedness we find as a result of both globalisation and internationalisation. In this regard, Professor Furmston was ahead of his time, as evidenced by his personal interest in comparative contract law on both systemic as well as specific levels (the latter in the form of case comments on significant decisions emanating from jurisdictions other than England as well as general articles which adopt a heavily comparative approach).

Conclusion

Moving from my more particular observations in relation to Professor Furmston’s articles, comments and essays, this might be an appropriate juncture to draw some of the general threads underlying his scholarship in this particular area together. It is clear that, right from the outset of his academic career, Professor Furmston demonstrated (if I may say so) the highest standards of excellence in academic scholarship. This is evident not only in the quality of his scholarship but also in the venues in which they were published. This is not, of course, to state that the venue in which a publication appears is conclusive of its quality. However, at that particular point in time (and given, especially, the relatively small number of top journals compared to what we have on offer today), that was a fairly reliable indicator of the quality of the work concerned. I should add that the survey also demonstrates that Professor Furmston was – and this is consistent with one of the main themes of this essay – never really concerned about the venue of publication but, rather, about whether or not it was a substantive (in particular, practical) contribution to the scholarship in that particular area of the law. I fully endorse this approach for that is the approach which I also adopted throughout my own academic career. There are, in fact, a number of articles published of mine published in so-called ‘lesser’ journals which I am especially proud of. Whilst academics should strive to publish in the most reputable journals, this ought not to be an end in itself, lest there result an unhealthy obsession which is (unfortunately) often coupled with an intellectual snobbery that is the very antithesis of the ideals of scholarship in general and legal scholarship in particular. If I may be permitted to say so, university administrations also need (if they have not already done so) to adopt a more enlightened and nuanced approach. Given the small number of top journals worldwide, if they adhered dogmatically and mechanically


See eg M P Furmston, ‘Subject to finance’ (1983) 3 OJLS 438 and, by the same author, ‘Letters of Intent and Other Preliminary Agreements’, above, n 120 and ‘Is there a Duty to Negotiate in Good Faith?’, above, n 185.
to the granting of tenure and promotion based mainly – if not solely – on publication in these journals, then I fear that, based on the law of averages alone, many bright legal scholars might never have succeeded in obtaining tenure and/or promotion. Whilst they should publish in top journals whenever they can, their work must surely be assessed based on the quality of the content rather than just by where they were published. The test is one of substance over form and in no way detracts from the imperative need for academic excellence to be demonstrated by all aspiring legal scholars in the work that they produce. I should also add that (except in the clearest cases) what constitutes a top-tier journal is itself controversial, thus underscoring the point just made to the effect that one ought, in the final analysis, to look to the substance rather than the form alone.

Returning to Professor Furmston’s scholarship, one is also struck by a point I have already made – the sheer variety of topics which he has covered not only across various legal disciplines but also within the law of contract itself. It is no wonder, then, that he is also ideally suited to edit one of the most widely read contract texts in the Commonwealth (viz, Cheshire, Fifoot and Furmston’s Law of Contract).

Another feature of Professor Furmston’s articles, comments and essays (which is also reflected in his book publications) is his willingness as well as ability to collaborate with others. This is a quality that ought to be seen more in legal academia. As iron sharpens iron, so also does intellectual collaboration, especially insofar as academic publications are concerned. But such collaboration also requires humility – in particular, a willingness to give as well as to receive. Whilst easy to state, it is not easy to practise. Professor Furmston is an excellent model to look to in this particular regard. As already mentioned, I have been a personal beneficiary of his expertise and (more importantly) humanity as well as kindness. May we all learn to be more like him as well.

Finally (and perhaps most importantly), Professor Furmston’s articles, comments and essays have also been cited extensively by other legal scholars. It is impossible to even begin to list the innumerable books, articles, comments and essays in which his work has been cited. However, an even more important indicia of academic excellence – the highest, in fact, in my view – is whether or not the work concerned has been cited in the courts. On this score, Professor Furmston’s work is perhaps one of the best illustrations of such achievement. However, before proceeding to touch on the influence which his publications have had on the law via their very extensive citation in numerous courts across the Commonwealth, I would like to consider (in the briefest of fashions) yet another category of publication which Professor Furmston has also been responsible for close to three decades – a specialist series of law reports.

Law Reports

As already mentioned, Professor Furmston is also the editor of the Construction Law Reports. Although it is a specialised area of the law, there is not insignificant overlap with the principles of contract and tort law. It is therefore especially appropriate that Professor Furmston is the editor of this series of law
reports covering an area that is of great importance not only to lawyers but also to all who are in the industry as well. The practical bent as well as versatility of Professor Furmston also comes once again to the fore. Indeed, this series of reports began as far back as 1985 and was first published by the Architectural Press and, commencing with the twelfth volume in 1989, by Butterworths, who has remained the publisher right to the present date. This series was in fact inaugurated by both Professor Furmston and the late Mr Vincent Powell-Smith. In the very first volume, the editors, in their Preface to the Series, elaborated on why such a series of reports was necessary.

It is one of the paradoxes of English law that although it develops through decided cases, it lacks any systematic programme for the reporting of cases. The construction industry has been particularly badly served in this respect, many important and interesting cases not being reported at all. The situation was greatly improved some years ago by the appearance of Building Law Reports but this excellent venture has not been able to close all the gaps in the system.

As was in fact later revealed, the idea for this series of reports in fact came originally from Judge John Newey QC; in Professor Furmston’s and Mr Vincent Powell-Smith’s words:

In a very real sense [Judge Newey] was the founding father of the series and always gave the editors every possible co-operation, despite the heavy burden of his office. We are proud to be honoured by his friendship.

Unfortunately, Vincent Powell-Smith passed away suddenly in Kuala Lumpur on 18 May 1997 and Professor Furmston has been the sole editor since. Let us turn now to an extremely important aspect of Professor Furmston’s scholarship – its influence on the development of the law itself.

The Influence of Professor Furmston’s Scholarship on the Law

As I have already alluded to above, the true measure of academic scholarship lies not only in its value as a resource for students, lawyers, judges as well as other legal scholars but also in the practical influence it has on the development of the law itself. Indeed, in my view, the highest accolade that can be paid to a piece of legal scholarship occurs when it is considered sufficiently important to be cited by a court.

I have already referred to Cheshire, Fifoot and Furmston’s Law of Contract in some detail during the course of this essay. Indeed, the book has not only been of use to students and lawyers. It has also been cited literally hundreds of times in

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188 See (1985) 1 Con LR, p vii.
190 And see his tribute to Mr Vincent Powell-Smith in (1997) 53 Con LR, p viii.
191 It is submitted that this is the case despite the caveats mentioned by Professor Duxbury: see generally Duxbury, above, n 10 at Ch 2.
cases across the world (and I am referring only to the editions which bear Professor Furmston’s name\textsuperscript{192}). So numerous were the citations in a check I conducted on the Lexis and Westlaw databases that it was possible (given the constraints of time) to look only in the briefest of fashions at each and every entry that was retrieved and even this exercise took a considerable number of hours. Subject to inevitable human error (although I did endeavour to reduce this via a third party check\textsuperscript{193}), here is a sampling which is (if I may be permitted to say so) quite staggering (I should add that I have only excluded citations within cases cited, not least in order to avoid double-counting and have also referred to paragraph numbers available within the Lexis as well as Westlaw versions wherever possible).

Put simply, the book has been cited in numerous jurisdictions (as well as the different courts and tribunals within each of those jurisdictions).

In the British Isles and the European Union, the book has been cited by the House of Lords (now the UK Supreme Court),\textsuperscript{194} the English Court of Appeal,\textsuperscript{195} the English High Court,\textsuperscript{196} the Judicial Committee of the Privy Council,\textsuperscript{197} the Northern Ireland Court of Appeal,\textsuperscript{198} the UK Employment Appeal Tribunal,\textsuperscript{199} the UK VAT

\textsuperscript{192} On occasion, his name has been given (mistaken) attribution as well! In this regard, reference may be made, for example, to the New Zealand editions of Cheshire and Fifoot’s Law of Contract – to which Professor Furmston’s name (as with the Australian edition, but in contrast with the Singapore and Malaysian edition) never attached. However, there are a number of New Zealand decisions which nevertheless attach his name to the title to the book: see eg the New Zealand Court of Appeal decisions of \textit{Minister of Education v De Luxe Motor Services} [1990] 1 NZLR 27 at 31; \textit{Savill v NZI Finance Ltd} [1990] 3 NZLR 135 at 145 as well as the New Zealand High Court decisions of \textit{Stratulatos v Stratulatos} [1988] 2 NZLR 424 at 436; \textit{Walsmsley v Christchurch City Council} [1990] 1 NZLR 199 at 205; \textit{Casper v Lawrence} [1990] 3 NZLR 231 at 239; \textit{HEB Contractors Ltd v Verristimo} [1990] 3 NZLR 754 at 761; Brown v Langwoods Photo Stores Ltd [1991] 1 NZLR 173 at 176; \textit{DFC Financial Services Ltd v Abel} [1991] 2 NZLR 619 at 633; \textit{Newmans Tours Ltd v Rainer Investments Ltd} [1992] 2 NZLR 68 at 103; \textit{TA Dellaco Ltd v PDL Industries Ltd} [1992] 3 NZLR 88 at 98; and \textit{Hatea Motors Ltd v Foote} [1993] 1 NZLR 629 at 634.

I acknowledge, once again, the kind assistance of Mr Koo Zhi Xuan.

\textsuperscript{194} See eg \textit{Total Gas Marketing Ltd v Arco British Ltd} [1998] CLC 1275 at 1289 and \textit{Fisher v Brooker} [2009] 1 WLR 1764 at [26].


\textsuperscript{197} See eg \textit{Phillip v Attorney General of Trinidad and Tobago} [2009] UKPC 18 at [17] and [18] (on appeal from the Court of Appeal of Trinidad and Tobago).

\textsuperscript{198} See eg \textit{Sweeney v Lagan Developments Ltd} [2007] NICA 11 at [19].

\textsuperscript{199} See eg \textit{Burns International Security Services (UK) Ltd v Archer} (EAT/1229/96, 19 June 1997; transcript available on Lexis) and \textit{Henry v Governors of Lambeth College} (EAT/430/96, 4 July 1997; transcript available on Lexis).
and Duties Tribunal,200 the Northern Ireland High Court,201 the Republic of Ireland Supreme Court,202 the Republic of Ireland High Court203 and the Court of Justice of the European Communities.204

In Oceania, the book has been cited by the High Court of Australia,205 the Federal Court of Australia,206 the New South Wales Court of Appeal,207 the Supreme Court of New South Wales,208 the New Zealand Supreme Court,209 the New Zealand Court of Appeal210 and the New Zealand High Court.211

In Canada, the book has found an impressive following in the Supreme Court of Canada,212 the Federal Court of Appeal (Ontario),213 the Federal Court of Canada,214 the British Columbia Court of Appeal,215 the Ontario Court of Appeal,216

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200 See eg Town & Country Factors Ltd v Commissioners of Customs and Excise (4 April 1997; transcript available on Lexis).
203 See eg Doolan v Murray & Others & Dun Laoghaire Corporation (21 December 1993; transcript available on Lexis).
204 See eg Grant v South-West Trains Ltd [1998] ICR 449 at [31].
205 See eg Lipohar v R (1999) 168 ALR 8 at [217].
206 See eg Damevski v Giudice (2003) 202 ALR 494 at [83].
207 See eg Macquarie Generation v Peabody Resources [2000] NSWCA 361 at [75].
211 See eg Howick Parklands Building Co Ltd v Howick Parklands Ltd [1993] 1 NZLR 749 at 762 and Polymer Developments Group Ltd v Tiliaio [2002] 3 NZLR 258 at [52].
213 See eg Royal Winnipeg Ballet v Canada (Minister of National Revenue) [2007] 1 FCR 35 at [76].
the New Brunswick Court of Appeal, the Alberta Court of Appeal, the Manitoba Court of Appeal, the Saskatchewan Court of Appeal, the Nova Scotia Court of Appeal, the Quebec Court of Appeal, the Newfoundland and Labrador Court of Appeal, the British Columbia Supreme Court, the British Columbia


See eg CSL Group v St-Lawrence Seaway Authority [1996] Carswell Que 1110 at [84].


Provincial Court, the British Columbia Labour Relations Board, the British Columbia Expropriation Compensation Board, the Ontario Superior Court of Justice, the Ontario Court of Justice, the Ontario Divisional Court, the Ontario Unified Family Court, the Ontario District Court, the Ontario Arbitration Board, the Alberta Court of Queen’s Bench, the Alberta Provincial Court.
the Prince Edward Island Supreme Court,243 the New Brunswick Court of Queen’s Bench,244 the Northwest Territories Supreme Court,245 the Yukon Territory Supreme Court,246 the Tax Court of Canada247 and the Canada Arbitration Board.248

The book has also been cited in the Caribbean – in particular by the Court of Appeal of Trinidad and Tobago.249

Last but not least, in Asia, the book has also been cited by the Court of India,250 the Hong Kong Court of First Instance,251 the Hong Kong High Court,252 the Hong Kong District Court,253 the Federal Court of Malaysia,254 the Malaysian Court of Appeal,255 the Malaysian High Court,256 the Singapore Court of Appeal257 and the Singapore High Court.258

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242 See eg Saunders v Baccalieu Auto Sales Ltd [2007] NJ No 287 at [16].


245 See eg Arctic Co-operatives Ltd v Siyamati Ltd (Receiver of) [1991] Carswell NWT 2 at [20].

246 See eg Ketza Construction Corp v Mickey [1999] Carswell Yukon 12 at [69].


249 See eg IMH Investments Ltd v Trinidad Home Developers Ltd [1994] FSR 616 at 655. Reference may also be made to the Privy Council decision of Phillip v Attorney General of Trinidad and Tobago [2009] UKPC 18 at [17] and [18] (on appeal from the Court of Appeal of Trinidad and Tobago), and cited above, n.

250 See eg MD, Army Welfare Housing Organisation v Sumangal Services Pvt Ltd [2003] 4 LRI 387 at [124].


253 See eg Chu Wai Man v Poon Kin Ming [2010] CHKEC 145 at [37].

254 See eg Khaw Hoh Chee v Ng Guik Peng & Ors [1996] 1 MLJ 761 at 775; Yap Hong Too and Anor v Wong Ah Mei and Anor [1997] 1 MLJ 545 at 550; and Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd [2011] 6 MLJ 464 at [62].

255 See eg Bank Bumiputra Malaysia Bhd v Mohamed bin Salleh [2000] 2 MLJ 412 at 415.


257 See eg K-Rex Finance Ltd v Cheng Chih Cheng [1992] 3 SLR(R) 296 at [17]; National Aerated Water Co Pte Ltd v Monarch Co, Inc [2000] 1 SLR(R) 74 at [43]; Man Financial (S) Pte Ltd v Wong Bark Chuan David [2008] 1 SLR(R) 663 at [93] and [104]; Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd [2008] 2 SLR(R) 623 at [53]; Family Food Court (a firm) v Seah Boon...
It should also be noted that other books co-authored259 as well as edited260 by Professor Furmston have also been cited by the courts, as have his articles.261

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258 See eg Faizlar Rahman v Bombay Trading Co (Pte) Ltd [1992] 2 SLR(R) 529 at [20]; China Insurance Co (Singapore) Pte Ltd v Liberty Insurance Pte Ltd [2005] 2 SLR(R) 509 at [60]; Koon Seng Construction Pte Ltd v Chenab Contractor Pte Ltd and another [2008] 1 SLR(R) 375 at [70]; Mano Vikrant Singh v Cargill TSF Asia Pte Ltd [2012] 1 SLR 311 at [55].


260 See eg M Furmston (Gen Ed), The Law of Contract (Butterworths Common Law Series) (4th Ed, LexisNexis, 2010), cited by the Singapore High Court in Mano Vikrant Singh v Cargill TSF Asia Pte Ltd [2012] 1 SLR 311 at [55]. The third edition of this work (published in 2007) was cited by the Federal Court of Australia in University of Western Australia v Gray [2009] FCAFC 116 at [91], [135] and [144] as well as Australian Medic-Care Co Ltd v Hamilton Pharmaceutical Pty Ltd (2009) 261 ALR 501 at [364], [455] and [456] and the Alberta Court of Appeal in Brick Protection Corp v Alberta (Provincial Treasurer) (2011) 337 DLR (4th) 154 at [48]. The second edition of this work (published in 2003) was cited by the High Court of Australia decision of Butcher v Lachlan Elder Realty Pty Ltd (2004) 212 ALR 357 at [213] and [221], the Federal Court of Australia decisions of Wallace-Smith v Thiss Intraco (Swanson) Pty Ltd [2005] FCAFC 49 at [55]; Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd (2006) 230 ALR 56 at [31], [32], [40], [59], [67] and [112]; Martech International Ptd Ltd v Energy World Corporation Ltd (2006) 234 ALR 265 at [159]; Martech International Ptd Ltd v Energy World Corporation Ltd [2007] FCAFC 35 at [22] and Fadu Pty Ltd (ACN 007 815 090) v ACN 008 112 196 Pty Ltd as Trustee of the ‘International Linen Service Unit Trust’ [2007] FCA 1965 at [15], the Supreme Court of New South Wales decision of Lahoud v Lahoud [2009] NSWSC 623 at [363] as well as in the Singapore Court of Appeal decisions of Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd v Wong Bark Chuan David [2008] 1 SLR(R) 663 at [45] and Family Food Court (a firm) v Seah Boon Lock and another (trading as Boon Lock Duck and Noodle House) [2008] 4 SLR(R) 272 at [30]. The first edition of this work (published in 1999) was cited in the House of Lords decision of Johnson v Unisys Ltd [2003] 1 AC 518 at [21]; the Hong Kong Court of Appeal decision of Shanghai Tongji Science & Technology Industrial Co Ltd v Casil Clearing Ltd [2003] HKCU 637 at [38]; and the British Columbia Supreme Court decision of No 151 Cathedral Ventures Ltd v Gartrell [2003] BCJ No 2715 at [200]. See also Beale, Bishop & Furmston, above, n 94; the 1990 edition of this work was cited in the Malaysian Court of Appeal decision of Anvest Corp Sdn Bhd v Wong Siew Choon Sdn Bhd [1998] 2 MJL 30 at 43.

Significantly, in this regard, a few of his earliest pieces have stood the test of time.\textsuperscript{262}

Finally, it should be noted that Professor Furmston has also been active as a consultant and practitioner. Indeed, he appeared – most notably – in the leading House of Lords decision in \textit{Ruxley Electronics and Construction Ltd v Forsyth}.\textsuperscript{263} Appearing with Mr Bryan McGuire, they successfully persuaded the House to allow the appeal in favour of their clients.

\textbf{Conclusion}

As the title of the present essay clearly states, Professor Furmston’s scholarship in the law of contract is both an ‘integrated’ as well as an ‘integral’ one. It is ‘integrated’ inasmuch as it has successfully blended both theory and practice into one seamless and organic whole.\textsuperscript{264} It is at once both scholarly as well as practical. This balance is not easy to achieve at all, as some academic writing tends (unfortunately, in my view) to be unnecessarily abstract and simply not very useful to courts, lawyers and law students alike. Professor Furmston’s work is the rare exception. Indeed, as we have seen, the citations of his work by the courts – especially of \textit{Cheshire, Fifoot and Furmston’s Law of Contract} – is staggering, given the citations literally across the globe and the sheer number of cases contained in those citations. I did not even attempt to locate the citations to his work in the academic literature for it would have been a task that would have literally taken years to accomplish (if at all).

Professor Furmston’s scholarship in the law of contract is also an “integral” one. I do not think that any person who claims that he or she has a firm grasp of the principles of contract law can justify that claim without having read the enormous corpus of his work in this field. Indeed, as I pointed out at the commencement of this essay, Professor Furmston is a ‘legal polymath’ whose scholarship extends to other fields as well.


\textsuperscript{263} [1996] 1 AC 344; and see, especially, at 349, where Professor Furmston’s arguments before the court are set out. See also A Phang, ‘Subjectivity, Objectivity and Policy - Contractual Damages in the House of Lords’, [1996] \textit{JBL} 362.

\textsuperscript{264} Indeed, after an initial draft of this essay had been prepared, a joint article by Professor Furmston and Professor Mouzas was published in the most recent issue of the \textit{Journal of Contract Law} which epitomizes this very point. In it, the learned authors propose a classification of contracts based on their real-life usage (see S Mouzas & M Furmston, ‘A Proposed Taxonomy of Contracts’ (2013) 30 \textit{JCL} 1).
All this would be sufficient to justify his status as one of the top legal scholars of both the twentieth and twenty-first centuries. But, if I may add a personal note, what marks Professor Furmston out as a truly great man is not only his legal scholarship but also his humanity as demonstrated in his deep and abiding concern for his family as well as for others (such as myself). And this does not come naturally – especially to persons of such sterling intellectual ability. We are fortunate that that ability is accompanied by great humility and an ability to appreciate as well as enjoy the simple pleasures in life. It is therefore a great honour and privilege to present this essay to Professor Furmston on the occasion of his eightieth birthday, to whom our very best wishes go for many more fruitful years ahead.