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SEDDON ON DEEDS

FOREWORD

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Dr Nicholas Seddon deserves our praise and thanks for writing this book about the law of deeds in Australia.

Until now, as he points out, when legal problems arose concerning that body of law, Australian lawyers were forced back to general legal encyclopaedias or to the English text *Norton on Deeds*, whose second edition was published in 1928, nearly 90 years ago. Since that time, there have been fundamental changes to the Australian legal system. The burgeoning statute law – federal, State and Territory – has significantly replaced the judge made common law in respect of most binding legal rules. The final termination of Privy Council appeals for Australia in 1986 cut off an important, earlier source of general legal doctrine. This was important because the high appellate courts in Australia rarely avail themselves nowadays of the opportunity to examine subjects like the law of deeds. Such subjects are commonly regarded of little general significance. They may seem (as the author himself describes them) to have not “the slightest interest”, except for specialised lawyers. Here too, statutes dominate our legal imagination.

We must therefore be grateful that Dr Seddon has devoted his exceptional talents and interests to writing this book. Its principal audience will be commercial and property lawyers who need to know

¹ Justice of the High Court of Australia (1996-2009); President of the New South Wales Court of Appeal (1984-1996); Judge of the Federal Court of Australia (1983-4); Chairman of the Australian Law Reform Commission (1975-84).

when the use of the formalities of a deed is useful, desirable or necessary. As he points out, the answer to these questions is generally going to be: “not very often”. And yet, lawyers, including in Australia, continue to use deeds all the time and thereby to invoke to law of deeds. When that is done, there are “hazards”. This is because “there are so many ways in which a mistake can be made”. Property lawyers, in particular, should therefore familiarise themselves with the warnings that are spelt out in the case law and in the statutory provisions, now collected in these pages.

When I first studied law in the 1950s, legal history was a compulsory subject in every law school in Australia. Because, as Lord Tennyson had recognised, ‘property, property, property’ was the centrepiece of England’s law, those were the subjects in which we searched the reasons of medieval and later English judges, even then covered with cobwebs. Historically speaking, Theodore Plucknett pointed out in his *Concise History of the Common Law* (4th Ed, Butterworth, 1948), the Anglo-Saxon law of the land recognised three categories. They were “ ‘Laen land’, Folkland’ and ‘Bookland’”. The great advantage enjoyed by the holder of land by book, or the claimant by book, was the ease of proof of title. Pluncknett explained: “Then, as for a thousand years to come, no oath could be given against a *charter* - just as no wager of law lay against a deed”.

The development of the common law by the King’s judges, had to confront a problem, specially common in an unlettered society, that disputes over property interests commonly had to be resolved by resort to oral testimony as to what the parties had agreed. After the Norman Conquest, a new emphasis was placed upon writing. Thus a contract

under seal of the parties was treated as a “form of agreement of the most solemn and binding kind”, designed to put an end to argumentation and to repel contrary oral evidence, at least in most cases involving the serious transactions in which that form of dealing was ordinarily invoked. The deep influence of the approach of the Anglo-Saxon law or oral trials generally obviated the requirement of a deed. The law upheld oral contracts, provided effective consideration could be proved. But deeds became usual, and sometimes essential, in some agreements, where oral contracts were not deemed safe or because the issues at stake suggested the necessity of greater formality.

Nick Seddon mentions this history in passing; but he does not dwell too long upon it. This is because most of the applicable history is now lost in the mists of time. It is often uncertain. In any case, is now frequently overtaken by statutory prescription. For the author, there is therefore no substitute to finding the applicable law, in order to ascertain whether the formality of a deed is useful, desirable or necessary. Of course, some commentators, whilst acknowledging that “lawyers love deeds”, insist that today deeds have become a “nuisance and snare” for lawyers and citizens alike. For such critics, it is precisely because the present law of deeds is frequently uncertain and often productive of seemingly absurd or unjust outcomes, that caution needs to be exercised in using them wherever they are not mandatory. The question is thus confronted: should this venerable form of solemn agreement simply be pensioned off? Is that a law reform whose time has at last come?

Because the author is a realist and considers that such an esoteric controversy would be of interest only to lawyers, as unlikely to attract a legislative response he elects instead to describe the circumstances

where the use of deeds is mandatory in law. Or where there may still be good reasons for using the formality of a deed. In such instances he examines the successive procedural steps that then need to be known so that the perils of unintended error can be avoided. Thus, in turn, he collects the special requirements of “execution”, essential to constitute a deed. This is followed by an examination of the separate elements of “delivery” in the execution of a deed, together with an examination of the facility of delayed action, by way of an escrow. There follows an analysis of the requirements for alteration of a deed that takes us into the 400 years of accumulated precedent around the troublesome rule in *Pigot’s Case*. The harsh effects of the cases have often led to anguished pleas for reform of the law. But, so far, it has only been reformed in one Australian State, New South Wales. There follows a compilation of cases that address the interpretation of deeds as a particular, formal, type of agreement between parties. The book closes with chapters on the enforcement of deeds and remedies for non-compliance with the deed’s obligations and the various ways in which the obligations of a deed may be discharged.

The high formalism that has gathered around the law of deeds was originally expounded in the medieval or post medieval period in England. In modern times, the resulting rules have often led to distaste over the imposition of such formalities upon the participants (especially modern business and commercial participants). And particularly where that consequence was not legally obligatory or expected.

In recent years, legislation has been enacted, both specific and general, to provide exemptions from some of the harshest consequences of applying the ancient law of deeds to an agreement so described, where

the parties (ignorant of the intricate law that they have accidentally invoked) are probably shocked by the seeming injustices of the old and rigid rules. Sometimes equity can provide relief. Sometimes judicial surgery can afford exceptions to the unexpected imposition on the parties of sanctions seriously disproportionate to the circumstances simply because of the use of the word “deed” to describe the governing agreement.

In the High Court of Australia in *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1995) 195 CLR 636 an issue arose in an appeal in which I participated as to whether a “deed” of company arrangement under statute could be made without the formalities of “delivery” required for the execution of a “deed” at common law. All members of the Court concluded that the imposition of such formal requirements, necessary to a “deed”, would be inappropriate to the circumstances. A plurality of the Court circumvented the old law. They held that a “deed of company arrangement” under the *Corporations Law* was not actually a “deed” at all. It was something *sui generis*, thereby escaping the apparently unmeritorious technical defence raised in the case. For me, the use of the word “deed” in the statute was intended to incorporate the still applicable law of deeds. However, a legislative exception could be invoked to provide retrospective relief to avoid what would otherwise have been the drastic consequences of an invalid execution.

This case demonstrates the fact that the law of deeds is potentially still relevant in our legal system. It can still be relevant to legal problems a millennium after such formal agreements were first devised. That is why contemporary lawyers must be grateful to Nicholas Seddon for providing this text. It is timely; indeed overdue. It illustrates once again the

powerful impact that legal history continues to have on Australia and its laws.

Almost thousand years ago the earliest judges and clerks of the newly installed Norman Kings of England, were grafting a Roman formality of solemn writing onto the chaos of the preceding Anglo-Saxon law. The struggle between formalism and certainty (on the one hand) and flexibility and individual justice (on the other) remains applicable to this day. This book explores a little corner of our legal history. It demonstrates its continuing operation – popping up unexpectedly with unforeseen consequences. Every lawyer who uses the magic formulae “signed, sealed and delivered” (or their modern equivalents) needs to pause to reflect on the legal history that has endured for a millennium. It still has consequences. And every lawyer who uses a deed needs to know them and to weigh their advantages and their dangers.

Sydney

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