

BOOK REVIEW

The Law of Rescission by Dominic O’Sullivan, Steven Elliott and Rafal Zakrzewski (New York: Oxford University Press, 2008) pages v–lxxiii, 3–699. Price £125.00 (hardcover). ISBN 978 0 19 925011 0.

MATTHEW HARDING*

*The Law of Rescission*¹ is a tremendous achievement. For the first time, a book sets out specifically, systematically, comprehensively, and as clearly as possible, the law relating to the rescission of contracts, deeds and gifts in England and Wales. For judges, practitioners and scholars in that jurisdiction, it will be an indispensable reference. In other Commonwealth jurisdictions such as Australia, the book is also likely to be of great use: first because, as Dominic O’Sullivan, Steven Elliott and Rafal Zakrzewski point out in their preface, the law of rescission is substantially the same across the Commonwealth;² and, secondly, because even where there are jurisdictional differences, the authors identify these differences and, with the occasional (understandable) exception,³ explain them. To write such a book, especially where none existed before, must have been a daunting undertaking and the authors are to be congratulated on the splendid result.

The book is laid out in seven parts. Part I (Chapters 1 to 3) aims to locate rescission as a discrete object of study, both conceptually and historically. Part II (Chapters 4 to 9) explores the grounds on which a person may either rescind or seek rescission. Part III (Chapters 10 to 12) discusses the mechanics of rescission, always insisting on the important distinction between rescission by election and rescission by order of the court, and emphasising the extinction of the contract that rescission brings about. In Part IV (Chapters 13 to 19), the authors turn to the consequences that flow — guided by the objective of *restitutio in integrum* — from the extinction of a contract following rescission. Part V (Chapters 20 to 22) considers the position of third parties where rescission has occurred, and Part VI (Chapters 23 to 28) looks at the bars to rescission that exist in the general law and in statute. Finally, Part VII (Chapter 29) focuses on the rescission of gifts and deeds, drawing distinctions where necessary with the rescission of contracts.

* BA (Hons), LLB (Hons) (Melb), BCL (Dist), DPhil (Oxon); Senior Lecturer, Melbourne Law School, The University of Melbourne.

¹ Dominic O’Sullivan, Steven Elliott and Rafal Zakrzewski, *The Law of Rescission* (2008).

² *Ibid* vii.

³ One such exception is created by the *Trade Practices Act 1974* (Cth) s 87. The authors make reference to this provision a number of times (see *ibid* lxxii for the references), but its implications for rescission in Australian law are not explored. This is perfectly justifiable given that the book is about English and Welsh law, but worth pointing out to an Australian audience.

When reading this book, one has a strong impression of the rigour and thoroughness with which the authors have dealt with their subject matter. Apparent inconsistencies and irrationalities in the law are always addressed, even if the conclusion is that they really are inconsistencies and irrationalities. Loose ends are always tied up. An excellent example of this may be found in Chapter 2, 'Rescission and Independent Claims'. Drawing analytical distinctions between the relief that follows rescission and relief in the form of compensation or disgorgement, the authors turn to the well-known decision of the Court of Appeal of England and Wales in *O'Sullivan v Management Agency & Music Ltd* ('*O'Sullivan*').⁴ The authors argue convincingly that the Court, in that case, failed to observe the distinction between rescission and disgorgement; their Lordships seemed to say that they were ordering an account of profits in order to bring about *restitutio in integrum*.⁵ However, the authors are not content simply to point out the Court's category error. They proceed to note that the result in *O'Sullivan* actually brought about *restitutio in integrum* because the account of profits was accompanied by an equitable allowance in favour of the defendants, the effect of which resembled counter-restitution.⁶ They then observe that the outcome of *O'Sullivan* would have been justified even if the disgorgement remedy had gone beyond what was necessary to bring about *restitutio in integrum* because the disgorgement remedy was justified for reasons — drawn from fiduciary law — that had nothing to do with the logic of rescission.⁷

Another example of the authors' rigour is their analysis in Chapter 29 ('Gifts and Deeds') of the decision of the High Court of Australia in *Garcia v National Australia Bank Ltd* ('*Garcia*').⁸ This was the case in which the 'wives' equity' of *Yerkey v Jones*⁹ was retained in preference to the doctrine based on constructive notice that was developed by the House of Lords in *Barclays Bank plc v O'Brien*.¹⁰ Although they do not say so explicitly, the authors may be taken to approve broadly of the policy objectives of the law in cases where a contract of guarantee, entered into by a wife in order to secure the debts of her husband, is rescinded because of duress, undue influence or misrepresentation on the part of the husband. These policy objectives are met in a case, such as *Garcia*, where the 'wives' equity' is available.

However, the authors are not satisfied with stating, on policy grounds, that *Garcia* was decided correctly; they identify a flaw in the reasoning of the majority of the Court which they expose and criticise. The majority stated that one of the facts that must be shown in order to obtain the 'wives' equity' is that the wife was a volunteer, meaning that she must have obtained no financial benefit from the guarantee that she was entering into.¹¹ According to the authors,

⁴ [1985] QB 428.

⁵ *O'Sullivan*, Elliott and Zakrzewski, above n 1, 38.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ (1998) 194 CLR 395. For the authors' discussion of *Garcia*, see *ibid* 668. See also *ibid* 238 fn 18.

⁹ (1939) 63 CLR 649.

¹⁰ [1994] 1 AC 180.

¹¹ *Garcia* (1998) 194 CLR 395, 408–9 (Gaudron, McHugh, Gummow and Hayne JJ).

where the person who seeks rescission is a volunteer, rescission ought to be available more easily because ordering rescission in such a case will not interfere with the law's interest in protecting bargains. However, as the authors point out, a guarantee is a contract, not a gift, and to describe a guarantor as a volunteer is a conceptual mistake.¹² Moreover, to insist that a wife show that she has obtained no financial benefit from a guarantee before allowing her to enforce her equity may present evidentiary difficulties.¹³ Finally, the authors argue that the volunteer requirement makes no sense when viewed against the backdrop of the policy objectives of the law when it comes to wives guaranteeing their husbands' debts.¹⁴ If one re-reads *Garcia* after considering the authors' criticisms of that case and excises references to the volunteer requirement from the majority's judgment, the reasoning in that judgment remains coherent and persuasive; indeed, the real reasons for the decision become clearer. This indicates, as well as anything, that the authors' criticisms are justified.

As the authors themselves remind us, rescission 'straddles the jurisdictional divide between the common law and equity'.¹⁵ As a result, their book, given its claim to comprehensiveness, has to address the question of whether rescission at common law remains distinct from rescission in equity over 100 years after the Judicature reforms of the 1870s. Indeed, that question is tackled head on in Chapter 10 ('Common Law, Equity, and Fusion'),¹⁶ which displays a mastery of how common law and equitable principles operate — sometimes separately from each other, sometimes together, and sometimes in parallel. One excellent example of this mastery is to be found in the section considering whether the rules of equity prevail over those of the common law when it comes to rescission.¹⁷ Overall, the chapter is carefully researched and argued, and it finds that

[t]he weight of authority supports the conclusion that the principles of rescission at common law and in equity remain distinct and separate doctrines, operating side by side, albeit in a manner that is sometimes overlooked.¹⁸

Some might object that the chapter avoids the question of whether rescission at common law and rescission in equity now *ought* to occur according to distinct rules and principles, or even whether we now *ought* to cease talking about rescission 'at common law' and 'in equity'. However, this objection would be unfair. First, the authors do offer some (admittedly tentative) arguments in defence of the current law.¹⁹ Secondly, and perhaps more importantly, a full-blown evaluation of the current law would have been inappropriate given the

¹² O'Sullivan, Elliott and Zakrzewski, above n 1, 668.

¹³ *Ibid* 669.

¹⁴ *Ibid*. These policy objectives are discussed in great detail in the judgment of Kirby J in *Garcia* (1998) 194 CLR 395, 421–9.

¹⁵ O'Sullivan, Elliott and Zakrzewski, above n 1, vii.

¹⁶ In his foreword to the book, Lord Robert Walker tells us that the author of Chapter 10 is Dominic O'Sullivan: *ibid* v.

¹⁷ *Ibid* 248–9.

¹⁸ *Ibid* 247.

¹⁹ *Ibid* 249–51.

type of book that the authors set out to write. On this latter point, I shall have more to say below.²⁰

In Chapters 11 and 12 ('Electing to Rescind' and 'Extinction of the Contract'), the authors draw out one fundamental distinction between rescission at common law and rescission in equity: at common law, rescission occurs by election; in equity (leaving to one side a line of authority suggesting otherwise that is dealt with admirably in Chapter 11),²¹ rescission occurs by court order and is therefore subject to the discretion of the court. One takes from these two chapters a sense that the mechanics of rescission at common law are informed by the sorts of considerations of personal autonomy that underlie classical liberal contract theory, whereas the mechanics of rescission in equity — traditionally understood, at least — reflect equity's paternalistic history. Of course, the most significant consequence of the fact that rescission in equity is subject to the discretion of the court is that, as Lord Blackburn said in *Erlanger v New Sombrero Phosphate Company*, the court may order rescission on terms that seek to 'do what is practically just' between the parties.²²

Having explained that rescission in equity entails the exercise of judicial discretion, and having acknowledged that this discretion may be exercised in order to achieve practical justice, the authors argue that, even in equity, the underlying logic of rescission — *restitutio in integrum* — always ought to be respected. In Chapter 13 ('General Principles of *Restitutio in Integrum*'), the authors contend that the case law reveals two 'heretical approaches'²³ in which the objective of *restitutio in integrum* has been abandoned in the pursuit of practical justice:

That is to say, a number of judgments appear to hold that practical justice should be achieved *even at the expense* of restoring the parties to their original positions. This represents a fundamentally different conception of rescission, if not of legal philosophy.²⁴

This argument should be of particular interest to Australian lawyers because the two 'heretical approaches' to which the authors refer emanate chiefly from Australian courts.

According to the authors, the first approach is evident in the following passage from the judgment of the Full Court of the Federal Court of Australia in *JAD International Pty Ltd v International Trucks Australia Ltd* ('*JAD International*')

Although a perfect restitution to the status quo ante may in fact be practically achievable in a given case, the Court may be justified ... in ordering rescission on terms that give the claimant rather less than that. ... [The claimant's] entitlement is to be restored only to the extent that will achieve what is practically just as between both parties.²⁵

²⁰ See below nn 59–64 and accompanying text.

²¹ O'Sullivan, Elliott and Zakrzewski, above n 1, 279–85, 289–91 (discussing, among other cases, *Alati v Kruger* (1955) 94 CLR 216).

²² (1878) 3 App Cas 1218, 1279.

²³ O'Sullivan, Elliott and Zakrzewski, above n 1, 311. See generally at 311–14.

²⁴ *Ibid* 311 (emphasis in original).

²⁵ (1994) 50 FCR 378, 387 (Keely, Hill and Drummond JJ).

To this, the authors respond as follows:

This idea is inconsistent with the way in which the principles governing the relief given upon rescission have conventionally been understood, the central tenet of which is that the restoration of the parties to their original positions is the criterion of practical justice. From this conventional viewpoint the idea that practical justice should be done at the expense of restoring the parties to their original positions is difficult to understand. It is not clear what alternative criterion of justice is being proposed. The proposal may simply be that justice should be done according to the judge's personal conception of what seems fair in all of the circumstances.²⁶

The authors have a valid criticism, but it is arguable that they overshoot their mark. To make their point, the authors need not interpret *JAD International* as advocating a crude realism in which a judge's personal preferences may influence their judgement. The case may be understood as advocating a sounder principle of distributive justice, according to which the position of the parties following rescission ought to track their relative merits or deserts.²⁷ Nonetheless, even when *JAD International* is interpreted in this more favourable light, the authors' criticism stands. Their argument may be reformulated to state that *restitutio in integrum* demands corrective rather than distributive justice and that the principles underlying rescission simply lapse into incoherence otherwise. Once the argument is reformulated in this way, the authors appear to be suggesting that an abandonment of the logic of corrective justice is also an abandonment of the logic of rescission, so that the court which is doing distributive justice cannot really be ordering rescission, whatever it thinks it is doing. Viewed in this light, the authors' earlier reference to different conceptions of 'legal philosophy' appears to be a reference to two different conceptions of justice.

The second 'heretical approach' that the authors identify is that taken by the High Court of Australia in the leading case of *Vadasz v Pioneer Concrete (SA) Pty Ltd* ('*Vadasz*').²⁸ There, *Vadasz* had contracted to guarantee debts owed by his company, *Vadipile Drilling Pty Ltd*, to *Pioneer Concrete*. However, *Vadasz* argued that due to a misrepresentation by *Pioneer Concrete*, he was induced to believe that the guarantee covered only future debts, whereas in fact it covered both past and future debts. The High Court of Australia was interested in two facts. First, *Vadasz* would not have contracted on the terms that he did ultimately contract on had the misrepresentation not been made. Secondly, *Vadasz* would have contracted to guarantee future (but not past) debts had the misrepresentation not been made. The Court therefore ordered partial rescission, enabling *Pioneer Concrete* to enforce the guarantee to the extent that it applied to future debts. The authors of *The Law of Rescission* pick out two propositions that they argue underpinned the conclusion in *Vadasz*:

First, the rescinding party is to be placed in the position he would have occupied if the misrepresentation or other vitiating factor had not occurred. Sec-

²⁶ O'Sullivan, Elliott and Zakrzewski, above n 1, 312.

²⁷ For the classical statement of the principle, see Aristotle, *The Nicomachean Ethics of Aristotle* (Sir David Ross trans, 1954 ed) book V chs 2–3 [trans of: *Ethica Nicomachea*].

²⁸ (1995) 184 CLR 102.

only, the other party is to be placed in no worse a position than is necessary in order to satisfy the first proposition.²⁹

The authors are critical of the approach in *Vadasz*, arguing that it ‘blurs the line between damages and rescission’ because its focus is on restoring the rescinding party to the position that they would have been in had the misrepresentation not occurred.³⁰ This is the ‘unilateral objective’ of an award of compensatory damages.³¹ For the authors, the bilateral objective of rescission is simply to undo the effects of a contract that has been made extinct. What would have happened in a counterfactual world, therefore, ought to be of no interest when ordering rescission.

As is the case with their criticism of *JAD International*, the authors’ criticism of *Vadasz* is valid, but may be slightly off target. The authors claim that the second ‘heretical approach’ is a ‘more sophisticated version’ of the first,³² which implies that the second approach, like the first, is best justified according to a principle of distributive justice. However, the partial rescission that the Court ordered in *Vadasz* might be justified according to a principle of corrective justice. Even an award of compensatory damages may be said to have a bilateral objective from a Kantian point of view, most famously adopted by Ernest Weinrib.³³ That bilateral objective is the correction of a normative imbalance occasioned by the infringement of a claimant’s right in the form of a defendant’s breach of duty. In *Vadasz*, it could be argued that Pioneer Concrete breached a duty it owed to *Vadasz* by committing the tort of deceit³⁴ or the tort of negligent misrepresentation.³⁵ It might also be said that this breach of duty occasioned a normative imbalance, which could only be corrected by putting the parties in the position that they would have occupied in a counterfactual world where the tort was not committed.³⁶

What the authors seem to be driving at in their criticism of *Vadasz* is that the rescission which was ordered brought about the *wrong kind* of corrective justice because the logic of rescission demands only the correction of material imbalances and not the correction of normative imbalances.³⁷ Undoing the effects of a rescinded contract *tout court* achieves the first objective, but — as *Vadasz* reveals — it may be insensitive to the achievement of the second. Partial rescission is able to achieve the second objective, but at the expense of the first.

²⁹ O’Sullivan, Elliott and Zakrzewski, above n 1, 313.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.* 312.

³³ See generally Ernest J Weinrib, *The Idea of Private Law* (1995).

³⁴ See *Derry v Peek* (1889) 14 App Cas 337.

³⁵ See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

³⁶ In *Vadasz*, no finding of fraud or negligence was ever made against Pioneer Concrete, but the High Court dealt with the case on the assumption that the misrepresentation was fraudulent: (1995) 184 CLR 102, 110 (Deane, Dawson, Toohey, Gaudron and McHugh JJ). If the misrepresentation was innocent, *Vadasz* would almost certainly not be susceptible to a Kantian analysis. This would leave no justification at all — let alone one that the authors of *The Law of Rescission* might view as misguided — for the partial rescission that was ordered, except to say that partial rescission was permitted by the *Trade Practices Act 1974* (Cth) s 87.

³⁷ The correction of material imbalances was what Aristotle had in mind in his discussion of corrective justice: Aristotle, above n 27, book V.

Whether this is a matter of concern depends on whether or not one thinks that normative as well as material imbalances ought to be taken into account when ordering rescission. In their criticism of *Vadasz*, the authors reveal themselves to be sceptical of the normative imbalance argument: for them, presumably, a normative imbalance is properly the concern of the law of tort and not the concern of the law of rescission.

In addition to reminding us that rescission straddles the common law and equity divide, the authors note in their preface that rescission ‘can involve both personal and proprietary rights.’³⁸ One of the most difficult questions in this regard is whether the right to seek rescission in equity by order of the court is proprietary in the sense that it gives its holder any rights to specific property that may be recovered once rescission is ordered. In Chapter 16 (‘Proprietary Claims’), the authors turn their minds to this question.³⁹ They conclude that the authorities are clear that the right to seek rescission in equity is a ‘personal right to recover title when rescission occurs’,⁴⁰ a right that lacks priority over the rights of subsequent acquirers of equitable interests in the property in question, even if it may share other characteristics with proprietary rights.⁴¹ Helpfully, the authors describe the right to seek rescission in equity not as an ‘equity’ nor as a ‘mere equity’, but instead, following Peter Birks, as a ‘power’ to bring into existence the right to an immediate transfer of the property that may be recovered upon rescission.⁴² That right, once brought into existence when the court orders rescission, is a proprietary right. This description avoids some of the obscurities in the judgments of the High Court decision in *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)*,⁴³ and does not shy away from the fact that the right to rescind is proprietary in some respects and personal in other respects.⁴⁴ It is to be hoped that the phrases ‘equity’ and ‘mere equity’ eventually give way to clearer descriptors in our law. Regrettably, this has not occurred in England and Wales, where, for example, s 116 of the *Land Registration Act 2002* (UK) c 9 retains the old language. Surprisingly, the authors neglect to mention this section, which displaces the position in equity with respect to registered land by stating explicitly that a ‘mere equity’ — including a right to seek rescission — is a proprietary right.

In Chapter 16, the authors consider another interesting question relating to proprietary relief: whether or not, in rescission cases — and, indeed, more generally — the so-called ‘remedial constructive trust’ is a welcome development in Commonwealth law.⁴⁵ The authors align themselves with the prevailing

³⁸ O’Sullivan, Elliott and Zakrzewski, above n 1, vii.

³⁹ The authors also tackle the question of whether an election to rescind in equity is proprietary in this sense, and they conclude that this is and ought to be the case where the election is to rescind for fraud: *ibid* 383–6.

⁴⁰ *Ibid* 377.

⁴¹ For example, that it may be traced or that a person may succeed to it: *ibid* 387, ch 22.

⁴² *Ibid* 378. The authors cite Peter Birks, *Unjust Enrichment* (2nd ed, 2005) 299–300.

⁴³ (1965) 113 CLR 265.

⁴⁴ R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (4th ed, 2002) 147–8 [4-150].

⁴⁵ For an excellent account of the ambiguities in describing a constructive trust as ‘remedial’, see Pamela O’Connor, ‘Happy Partners or Strange Bedfellows: The Blending of Remedial and

view in England and Wales, stating that '[i]n principle both the entitlement to a proprietary interest upon rescission and the extent of that interest should be governed by fixed and pre-determined rules.'⁴⁶

In other words, the remedial constructive trust, the availability of which depends on how a court exercises its discretion,⁴⁷ is an unwelcome development. It therefore comes as no surprise to learn that the authors disapprove of the decision of the New South Wales Court of Appeal in *Robins v Incentive Dynamics Pty Ltd (in liq)* ('*Robins*'), in which rescission of a loan agreement was accompanied by the imposition of what the Court described as a 'remedial constructive trust'.⁴⁸

In *Robins*, the directors of a company had provided company money to a second company, which then used that money to purchase real estate. Delivering the leading judgment in the case, Mason P found that the directors had provided the money in breach of fiduciary and statutory duties and that the recipient company was liable for knowing receipt under the first limb of *Barnes v Addy*.⁴⁹ Mason P thought that the money had been provided under a loan agreement, and he therefore ordered rescission of that agreement based on the breaches of duty which had caused it to be entered into.⁵⁰ His Honour thought that a remedial constructive trust over the proceeds of sale of the real estate was justified based on the knowing receipt.⁵¹

The authors view *Robins* as an anomaly, even in Australian law where the remedial constructive trust is well established:

there is ... no suggestion in the English and Australian authorities [apart from *Robins*] that the availability of proprietary rights arising upon equitable rescission is subject to judicial discretion ...⁵²

The authors' disapproval of the decision follows immediately:

and that is as it should be. Absent a legislative mandate it should form no part of the judicial function to adjust property rights on a discretionary basis. Rights of property should arise and be lost only in accordance with pre-determined rules.⁵³

Regardless of whether or not courts ought to adjust property rights on a discretionary basis,⁵⁴ the authors' disapproval of *Robins* focuses on a part of the

Institutional Features in the Evolving Constructive Trust' (1996) 20 *Melbourne University Law Review* 735.

⁴⁶ O'Sullivan, Elliott and Zakrzewski, above n 1, 395. See also *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 714–15, cf 716 (Lord Browne-Wilkinson).

⁴⁷ See *Giumelli v Giumelli* (1999) 196 CLR 101, 113 (Gleeson CJ, McHugh, Gummow and Callinan JJ).

⁴⁸ (2003) 175 FLR 286.

⁴⁹ (1874) LR 9 Ch App 244.

⁵⁰ *Robins* (2003) 175 FLR 286, 301.

⁵¹ *Ibid* 301–2.

⁵² O'Sullivan, Elliott and Zakrzewski, above n 1, 395.

⁵³ *Ibid*.

⁵⁴ See Peter Birks, 'Rights, Wrongs, and Remedies' (2000) 20 *Oxford Journal of Legal Studies* 1; contra Simon Evans, 'Defending Discretionary Remedialism' (2001) 23 *Sydney Law Review* 463.

decision — the award of a remedial constructive trust upon rescission in equity — that may turn out to be irrelevant. This is because it is arguable that the decision in *Robins* entailed errors more fundamental than that which bothers the authors.

First, it is arguable that the correct basis for proprietary relief in *Robins* was not the first limb of *Barnes v Addy*, but rather the fact that the claimant retained an equitable proprietary interest in the money which was provided to the defendant, with that interest surviving the transfer because the defendant received the money with notice of it. If that is true, proprietary relief was a necessary and inevitable response to what Professor Birks calls a ‘vindictio’ with respect to (the traceable proceeds of) property that always, in equity, belonged to the claimant.⁵⁵ If a subsisting equitable proprietary interest was the correct basis for proprietary relief in *Robins*, then the Court should have declared and enforced a constructive trust that arose, not out of any exercise of discretion, but rather according to ‘fixed and pre-determined rules.’⁵⁶ Secondly, as Giles JA pointed out in his concurring but separate judgment in *Robins*, it could be argued that rescission was not necessary in order for proprietary relief to be awarded in that case. In its statement of claim, the claimant had sought personal relief on the basis that the money had been loaned to the defendant. However, proprietary relief had been sought on the basis that the money had been ‘provided’ to the defendant. According to Giles JA, this latter pleading could be interpreted such that ‘[i]t was as if the money had been stolen by [the defendant]’, making rescission irrelevant.⁵⁷ If these two arguments are correct, then the authors’ disapproval of *Robins* is well-founded, but they need not worry that the law of rescission is necessarily compromised by the decision.

Given the size of *The Law of Rescission*, I have been able to touch on only a fraction of the questions and issues raised and dealt with — always admirably — by the book. In particular, I have not mentioned Part II of the book, in which the authors set out the grounds for rescission. This set of chapters (Chapters 4 to 9) is a valuable contribution to the law of contract literature, even when taken on its own. Doctrinal debates, such as the debate over whether duress and undue influence are vitiating factors or civil wrongs, are dextrously, if sometimes briskly, handled.⁵⁸ Of course, the law set out is not always identical with Australian law — some of the material dealt with in Chapter 7 (‘Mistake, Impaired Capacity, and Unconscionable Bargains’) is a notable example — but there is plenty in Part II of relevance to lawyers in all Commonwealth jurisdictions.

In conclusion, a few words should be said about methodology because, even if there once was a time at which questions of method did not figure in thinking about private law, that is certainly not the case today. In a well-known article first published in 1992, Richard Posner distinguished between what he called

⁵⁵ Peter Birks, ‘Receipt’ in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (2002) 213, 215–22.

⁵⁶ O’Sullivan, Elliott and Zakrzewski, above n 1, 395.

⁵⁷ *Robins* (2003) 175 FLR 286, 303.

⁵⁸ O’Sullivan, Elliott and Zakrzewski, above n 1, 137–8.

‘top-down’ and ‘bottom-up’ legal reasoning. According to Posner, top-down legal reasoning entails an approach to law that evaluates it according to theoretical criteria and whose method is deduction from theoretical premises. By contrast, bottom-up legal reasoning shies away from evaluation and adopts an inductive method in the form of analogy from decided cases.⁵⁹ In addition to this distinction drawn by Posner, within the field of top-down legal reasoning a further distinction may be drawn between top-down reasoning of an analytical kind and of a functionalist kind. The former proceeds from assumptions about the meaning of concepts deployed by lawyers; the latter proceeds from assumptions about the functions that are served by such deployment.⁶⁰

Against this backdrop, thinking and writing about private law — indeed, about any body of law — takes place in a methodological minefield. The scholar must work out answers to a number of questions. Is top-down reasoning allowed? If it is, to what extent, and which form should it take: analytical, or functionalist? If top-down reasoning is not allowed, why not? The recent passage of *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* through the NSW courts, and ultimately to the High Court, illustrates amply the importance of working out answers to these questions.⁶¹ There, different conceptions of permissible method appear to have played their role in a unanimous High Court overturning the decision of a unanimous NSW Court of Appeal.⁶²

The authors of *The Law of Rescission* negotiate their way through the minefield with great success. On the one hand, they resist the temptation to pronounce decided cases to be wrong with ‘considerations of ideal taxonomy’ in mind.⁶³ On the other hand, they refrain from trying to draw coherent principles from cases in which they are simply not to be found. Their approach is firmly grounded in an analytical method that eschews the ‘law and ...’ approach of the functionalists. If the method of the authors is to be described, the appropriate word is ‘balanced’: a mixture of top-down and bottom-up and analytical throughout. In private law scholarship today, there is much to be said for such a method, not only because it generates work that practitioners may use from day to day, but also because it may be the most accurate reflection of the practice of law itself — what Jules

⁵⁹ See Richard A Posner, ‘Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights’ (1992) 59 *University of Chicago Law Review* 433, reprinted as Richard A Posner, *Overcoming Law* (1995) ch 5. See also Justice Keith Mason, ‘What Is Wrong with Top-Down Legal Reasoning?’ (2004) 78 *Australian Law Journal* 574.

⁶⁰ For a fascinating account of how these two different top-down methods help to explain why some private law topics command the scholarly and judicial attention in the Commonwealth that they fail to command in the USA, see Chaim Saiman, ‘Restitution in America: Why the US Refuses to Join the Global Restitution Party’ (2008) 28 *Oxford Journal of Legal Studies* 99.

⁶¹ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2004] NSWSC 800 (Unreported, Palmer J, 19 August 2004); revd [2005] NSWCA 309 (Unreported, Mason P, Giles and Tobias JJA, 15 September 2005); revd (2007) 230 CLR 89.

⁶² On the appropriate language for an appellate court to use when overturning decisions in this way, see Justice Keith Mason, ‘Throwing Stones: Cost/Benefit Analysis of Judges Being Offensive to Each Other’ (2008) 82 *Australian Law Journal* 260.

⁶³ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 158 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

Coleman calls the 'practice of principle'.⁶⁴ If that is true, there ought to be more books like *The Law of Rescission*.

⁶⁴ See Jules Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (2001).