

# Journal of Contract Law (JCL)

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(editorial, articles and book review essay included in this part are linked to the LexisNexis platform)

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#### Articles

Implied Terms — Are the *BP Refinery* Criteria Broken? A Theoretical and Empirical Analysis

— *Simon Frauenfelder* 103

When it comes to the factual implication of contractual terms, the five criteria from *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* have to date held an unquestioned ascendancy in Australian law. But that has never been the position in other common law jurisdictions and, more recently, the Privy Council and the Supreme Court of the United Kingdom have questioned and recast the *BP Refinery* criteria. Should Australian law follow suit? This article answers that question by reference to authority, commentary and an empirical review of every Australian superior and appellate court decision that applied *BP Refinery* from January 2000 to June 2022. It argues that the ‘reasonable and equitable’ criterion ought to be jettisoned, but the ‘necessity’ and ‘obviousness’ criteria should be retained as cumulative requirements. It is also suggested that this analysis has significance beyond the Australian context.

The New Law on Penalties in Malaysia: The Impact of *Cubic Electronics* after *Cavendish Square*

— *May Fong Cheong and Pei Meng Tan* 132

Developments in the doctrine of penalties in the common law world in recent years have been described as a revolution. In Malaysia, the apex court’s decision in *Cubic Electronics* has revolutionised the law on penalties provided in s 75 of the Contracts Act 1950. Following the United Kingdom Supreme Court’s decision in *Cavendish Square*, the Malaysian Federal Court in *Cubic Electronics* endorsed the application of s 75 to deposits, adopted the concepts of ‘legitimate interest’ and ‘proportionality’ to determine reasonable compensation, and reformulated the rules on burden of proof. The impact of *Cubic Electronics* on the law of penalties in Malaysia is significant. The above changes will likely result in more liquidated damages clauses being upheld by the Malaysian courts. While the new law promotes party autonomy, there needs to be a corresponding increase in vigilance to prevent abuse of that freedom. The need for a balanced approach applies equally to the development of the law on penalties in the other common law jurisdictions succinctly surveyed in this article.

## Removing Consideration as a Requirement for Contract Variations in the New Zealand Context

— *Matthew Barber*

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The longstanding issues associated with requiring consideration for contract variations have been the subject of much attention recently. Following the suggestion of Brian Coote, the New Zealand Court of Appeal has twice commented that it may be best to remove the requirement altogether. Courts of Appeal in New Brunswick and British Columbia have adopted this approach, while the Singapore Court of Appeal considered and ultimately affirmed the consideration requirement. This paper examines the various possible responses to this issue and, in particular, the method, scope and fit of the approach of removing the consideration requirement for contract variations in the context of New Zealand law.

## Advancing the Proposition that the Doctrine of Affirmative Mutuality is a Fallacy

— *Nicole Toy and Kenneth Yin*

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'Affirmative' (or 'positive') mutuality is said to arise where specific performance would ipso facto be granted to one party because specific performance would be granted to the other. The doctrine of affirmative mutuality in Australia is described as 'established', albeit in the face of deep criticism. This paper propounds that the doctrine of affirmative mutuality is a fiction, because: first, affirmative mutuality is incompatible with fundamental equitable precepts and more specifically with any approach to mutuality in Australian jurisprudence; and second, even more acutely, in cases where the decree of specific performance was said to have been underpinned by affirmative mutuality, relief was in fact predicated on the express basis that damages were inadequate, not despite the adequacy of damages, the latter being a central feature of affirmative mutuality.

## Can a No Set-Off Clause Preclude a Challenge to Its or the Contract's Validity?

— *John Ren*

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When a plaintiff seeks to enforce a contractual claim for payment in the (instant) proceeding by resorting to a no set-off clause in the contract, the defendant may raise a cross-claim challenging the validity or enforceability of the clause or of the contract. While it should be obvious that such a clause cannot preclude a challenge to the validity or enforceability of the clause itself from being adjudicated in the instant proceeding, this article proposes that the clause cannot preclude a challenge to the validity or enforceability of the whole contract either, for otherwise the clause would ouster the jurisdiction of the courts and also because a challenge to the validity or enforceability of the contract is also a challenge to that of the clause. In addition, the article examines relevant cases in England, Australia and New Zealand, which shows that the proposition is supported by the weight of the authorities.

## Illegality and Restitution in Malaysia: How Far Have We Come?

— *Adnan Trakic*

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In *Public Bank Bhd v Ria Realiti Sdn Bhd*, the Court of Appeal ushered in a new era for illegality law in Malaysia by fully endorsing the UK Supreme Court's decision in *Patel v Mirza*. The rule-based

approach was replaced by Patel’s ‘trio of considerations’ test, which gives judges structured judicial discretion and flexibility in awarding restitution when the illegality defence is invoked. However, the full endorsement of Patel may present challenges due to conflicting interpretations of the phrase ‘discovered to be void’ in s 66 of the Contracts Act 1950 (Malaysia). Additionally, there appears to be resistance to following Patel in cases involving statutory illegality. This article aims to determine the extent to which Patel applies in Malaysia, taking into account potential statutory limitations.

## The Contractualisation of Philanthropy

— *Natalie Silver*

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The legal framework governing charitable giving seeks to balance individual donor autonomy against the requirement that charities apply donations to charitable purposes for the public benefit. In Australia, contract law has been largely absent from this legal framework. However, as philanthropy has evolved, sophisticated donors making large charitable gifts are increasingly entering into gift agreements with charities stipulating how their donated funds are to be applied. These contemporary philanthropic transactions raise important doctrinal questions regarding the ability of these restricted charitable gifts to create legally enforceable contracts, as well as the normative implications of this emerging intersection of charity law and contract law on the legal framework for charitable giving in Australia.

## Book Review Essay

### Book Review Essay

— *Justice Mark Leeming*

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