1-2022

Giants of contract law – Some personal reflections

Hon. Andrew PHANG
Justice of the Court of Appeal, Supreme Court of Singapore

GIANTS OF CONTRACT LAW – SOME PERSONAL REFLECTIONS

The law of contract may seem mostly technical and, on occasion, even overly theoretical. However, if one looks more closely at its foundations as well as scholarship, it is clear that contract law has much greater value to offer us. In that regard, the present essay has two main aims. The first is the give a brief account of the lives as well as scholarship of four giants of contract law whom we have lost in the past few years. Indeed, it may be said that their scholarship has contributed to the foundational bedrock of the law of contract as we know it today; a great debt of gratitude is owed to them. The second aim is to draw out some life lessons of more general application for us all.

Andrew **PHANG** Boon Leong*
Justice of the Court of Appeal, Supreme Court of Singapore

I. Introduction

1 This is not a scholarly article in the traditional sense; in many ways, it is more important because it concerns *people*, in particular, the giants of contract law whom we have lost in the past few years.[1] This generational loss is particularly acute because, as I have observed elsewhere:[2]

> Contract law is a foundational topic in the law of obligations. A sound understanding of it is essential to legal practice. It is also a fascinating subject. Its

* My grateful thanks to Professor Goh Yihan, SC, Dean of the Yong Pung How School of Law, Singapore Management University as well as to Ms Marissa Chok, Ms Etsuko Lim and Mr Nguyen Sinh Vuong, Justices' Law Clerks, Supreme Court of Singapore, for their valuable comments and suggestions. However, all views expressed in this essay are personal only and do not reflect in any way the views of the Supreme Court of Singapore.

1 There are, of course, giants in the field who are happily still with us and who do not form part of the present essay. See, for example, the work of Australia's leading contract scholar, Professor J W Carter (as to which see Andrew Phang and Goh Yihan, "Pioneering Scholar and Practitioner – The Life and Work of Professor J W Carter" (2017) 34 JCL 100 (a greatly expanded version of Andrew Phang, "The Legal Scholarship of Professor J W Carter: An Appreciation" (2014) 28(1) CLQ 23)).

2 Andrew Phang, "Recent Developments in Singapore Contract Law" [2020] JMJ 100, 100. Reference may also be made to Andrew Phang, *Foreword* to *Contract Law in Singapore: Cases, Materials and Commentary* by Burton Ong and Benjamin Wong (Gen Eds) (Singapore Academy of Law, 2019), p viii.

> importance in the practical sphere belies its complex theoretical underpinnings.

2 I should add that perhaps an essay such as this may be of particular value to students as it does contain one or two personal life lessons; it is therefore particularly apposite that it appears in a student-run journal such as the present. Indeed, when I was a student – now over four decades ago – the scholars whom I shall be referring to in this essay were already well established in the field. Two of them – Professor Michael Philip Furmston and Professor Sir Guenter Heinz Treitel – were the authors of two of the leading contract textbooks. These textbooks continue to be amongst the leading contract textbooks today – *Cheshire, Fifoot and Furmston's Law of Contract*[3] and *Treitel on the Law of Contract*,[4] respectively. There was a third textbook which stood in between and which was therefore relatively more popular with students – *Anson's Law of Contract*.[5] As I have recounted elsewhere, *Treitel on the Law of Contract* "was perceived (by the students at least) to deal with too many specialised points and was therefore referred to – if at all – after reading one or both of the [other textbooks][6]".[7] As for myself:[8]

> 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

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3 Then in its ninth edition, and presently in its seventeenth edition.
4 Then in its fourth edition, and presently in its fifteenth edition.
5 Then in its twenty-fourth edition, and presently in its thirty-first edition.
6 *Viz*, *Cheshire and Fifoot's Law of Contract* and *Anson's Law of Contract*.
7 Andrew Phang, "Theory as Practice and Practice as Theory – The Integrated and Integral Contract Scholarship of Professor Michael Furmston" (2014) 31 JCL 12, 14.
8 Andrew Phang, "Theory as Practice and Practice as Theory – The Integrated and Integral Contract Scholarship of Professor Michael Furmston" (2014) 31 JCL 12, 14.

> blue cover of the previous (eighth) edition, published in 1972).

3 During that particular point in time, there was also a book by a third scholar – Professor Patrick Selim Atiyah's *An Introduction to the Law of Contract*.[9] As I have observed:[10]

> [T]he 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.

4 The fourth and final scholar considered in the present essay, Professor Brian Coote, hails from New Zealand where he had, as we shall see, a profound impact on New Zealand contract law. However, as we shall also see, his scholarly influence reached the shores of many other jurisdictions as well, including England and Singapore. His principal work, entitled *Exception Clauses*,[11] was based on his prize-winning Cambridge doctoral thesis[12] and is, despite its relative vintage, still the seminal work on exception clauses in the Commonwealth. Indeed, as a student, my first encounter with Professor Coote's work was in relation to his ground-breaking articles critiquing the doctrine of fundamental breach in the context of exception clauses, the law of which (for unfortunate students such as ourselves) was in a state of confused (and confusing) flux.[13]

5 On a more personal level, as someone whose interests in legal academia were focused on the law of contract, I have always been interested in the leaders in the field. Indeed, this interest goes beyond the law of contract.[14] As mentioned at the outset of this essay, *people* are

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9 Then in its second edition, and presently in its sixth edition (updated by Professor Stephen A Smith).

10 Andrew Phang, "Theory as Practice and Practice as Theory – The Integrated and Integral Contract Scholarship of Professor Michael Furmston" (2014) 31 JCL 12, 14.

11 Sweet & Maxwell, 1964.

12 This was the famous Yorke Prize.

13 This was prior to the clarification by the House of Lords in *Photo Production Ltd v Securicor (Transport) Ltd* [1980] AC 827, which held that the doctrine of fundamental breach was *not* a "rule of law" but was, instead, a "rule of construction".

14 A number of such books along these lines sit on my bookshelf at the time of writing, still waiting to be read: see James Goudkamp and Donal Nolan (Eds), *Scholars of Tort Law* (Hart Publishing, 2019) (Professor Goudkamp informs me that there will also be a forthcoming companion volume of sorts, entitled *Scholars of Contract Law*); Susan

important. Equally important is having a sense of *history*.[15] I should also add that the sub-title of this essay refers to personal reflections from a broad and general perspective; it is not coincident with personal acquaintances (let alone friendships). That having been said, I did have close contact as well as a personal friendship with Professor Furmston and have met and corresponded with Professor Coote. I only had one e-mail exchange with Professor Treitel and my only encounter with Professor Atiyah was at a symposium to mark Lord Denning's one-hundredth birthday in 1999 (where, unfortunately, I did not have the opportunity to interact with Professor Atiyah personally).[16]

6 With these brief introductory remarks, I turn now to the individual scholars concerned, commencing with the one with whom I have had the most contact.

Bartie, *Free Hands and Minds – Pioneering Australian Legal Scholars* (Hart Publishing, 2019); and (much more generally) James Gordley, *The Jurists – A Critical History* (Oxford University Press, 2013). For a local – and pioneering – effort, see Dora Neo, Tang Hang Wu and Michael Hor (Eds), *Lives in the Law – Essays in Honour of Peter Ellinger, Koh Kheng Lian & Tan Sook Yee* (National University of Singapore & Academy Publishing, 2007). In so far as my own (more modest) writings are concerned, see "Mr Young Cheng Wah: A Personal Appreciation" (1995) 16 Sing LR 23; "Exploring and Expanding Horizons: The Influence and Scholarship of Professor J L Montrose"(1997) 18 Sing LR 13; "Founding Father and Legal Scholar – The Life and Work of Professor L A Sheridan" [1999] Sing JLS 335; "Contract as Assumption – The Scholarship and Influence of Professor Brian Coote", (2011) 27 JCL 247; "Theory as Practice and Practice as Theory – The Integrated and Integral Contract Scholarship of Professor Michael Furmston" (2014) 31 JCL 12; "A Legal Giant Revisited – Thomas Edward Scrutton and the Development of English Commercial Law" (2015) 32 JCL 119; (with Goh Yihan) "Pioneering Scholar and Practitioner – The Life and Work of Professor J W Carter" (2017) 34 JCL 100 (a greatly expanded version of "The Legal Scholarship of Professor J W Carter: An Appreciation" (2014) 28(1) CLQ 23); (with Chief Justice Sundaresh Menon), "A Judge for the Ages" in Andrew Phang Boon Leong and Goh Yihan (Gen Eds), *A Judge for the Ages – Essays in Honour of Justice Chao Hick Tin* (Academy Publishing, 2017), 1–34; as well as "Obituary – Professor Michael Philip Furmston, 1 May 1933 – 28 June 2020" (2020) 36 JCL 201.

15 Andrew Phang Boon Leong, *From Foundation to Legacy – The Second Charter of Justice* (Singapore Academy of Law, 2006), 1, where it is observed that "[a]n historical memory enables us both to be encouraged by the successes of the past as well as to learn from its failures. It also guides us in the present and helps us to plan wisely for the future." See also, by the same author, "Which Road to the Past? – Some Reflections on Legal History" [2013] Sing JLS 1, 17.

16 P S Atiyah, "Lord Denning's Contributions to Contract Law" [1999] Denning LJ 1. In so far as my own contribution was concerned, see Andrew Phang, "The Natural Law Foundations of Lord Denning's Thought and Work" [1999] Denning LJ 159 (reference may also be made, more recently, to Andrew Phang, "A Passion for Justice – Lord Denning, Christianity and the Law" in Mark Hill and R H Helmholz, *Great Christian Jurists in English History* (Cambridge University Press, 2018), Ch 15).

II. Professor Michael Furmston

A. The Person

7 I begin with Professor Michael Furmston. As I have pointed out elsewhere, I had two "encounters" with him.[17] The first, as a student, was (as already mentioned above[18]) with his work – in particular, *Cheshire and Fifoot's Law of Contract* (as it was then entitled). As also mentioned, the cover of that particular edition – the ninth (published in 1976) – was a distinctive purple cover. More importantly, though, that edition in fact marked the changing of the legal guard, so to speak, for that book for it was the first time that Professor Furmston had taken over the reins of this work completely. On a personal level, this would have added significance for me approximately a decade later, as I shall explain below.

8 My second encounter with Professor Furmston was in person. Indeed, it was the first time that we had met. I was then part of the faculty at the Faculty of Law of the National University of Singapore. Professor Furmston was a visiting Professor in 1987. Significantly, perhaps, the eleventh edition of *Cheshire and Fifoot's Law of Contract* had recently been published (in 1986) and the title of the book had been changed for the first time in over four decades to include Professor Furmston's name as well; *Cheshire and Fifoot's Law of Contract* would thereafter be known as *Cheshire, Fifoot and Furmston's Law of Contract*.[19] He kindly autographed my copy for me – a point of personal significance to which I shall return shortly. Not surprisingly, he was tasked to conduct some of the contract lectures. I was also involved in the course. From my past experience, meeting an eminent professor, particularly when one is a relatively junior academic, is (at least potentially) a somewhat daunting experience. However,

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17 Andrew Phang, "Theory as Practice and Practice as Theory – The Integrated and Integral Contract Scholarship of Professor Michael Furmston" (2014) 31 JCL 12, 14−15.

18 Above, n 8.

19 M P Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (Butterworths, 11th Ed, 1986). And as Professor Furmston himself observed in the very first words of the *Preface* to that particular edition (p v):

> 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. 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.

Professor Furmston was completely personable and put me at ease at once. What struck me was his genuineness as a person even though he was such an eminent and world-renowned scholar. He certainly did not take himself too seriously and was genuinely interested in establishing friendships as well as learning about Singapore in all its various aspects. He also enjoyed good food and really appreciated the variety of cuisines that is one of the hallmarks of Singapore culture. In my experience, this was a rare occurrence. Many eminent professors tend to keep their distance; unfortunately, some (though, fortunately, very few) appear to be too caught up in their academic status and reputation although I hasten to add that the very best do not. And Professor Furmston was amongst the very best. As I put it elsewhere:[20]

> Despite his vast learning and scholarship, Michael was – above all – a person who touched many lives across the globe in a manner that few leading scholars in his position could. He was colleague and mentor to many too numerous to mention here. His advice on scholarly matters and (above all) life knew no borders; he was a friend and mentor to all who were willing and (perhaps more importantly) all who were in need. His was a cosmopolitan approach that was way ahead of its time. It was a simple – yet profoundly touching – approach to life, which spoke volumes about his humility and humanity.

9 Indeed, Professor Furmston went much further, as alluded to in the paragraph just quoted. At the expense of repetition, he was always willing to listen to others such as myself and to furnish relevant advice in return. This was not to say that he was soft – far from it.Whilst he was patient and kind, he was also sharp and well versed in the ways of the world and would therefore not let persons of bad faith get away with impunity. Indeed, this demonstrates the fine line between being personable and empathetic on the one hand and being a proverbial doormat on the other – as well as the importance of having the wisdom to discern one from the other as a vital quality in life because mere book-learning and academic accolades alone are insufficient for the attainment

[20] Andrew Phang, "Obituary – Professor Michael Philip Furmston, 1 May 1933 – 28 June 2020" (2020) 36 JCL 201, 201.

of such wisdom. Nevertheless, where it was merited, Professor Furmston was (as I have already mentioned) quick to display in tangible (and varied) ways his humility and humanity. Indeed, wherever he went, he was always prepared to be a mentor to any scholar who was receptive, regardless of their seniority. As I observed very recently when reviewing his very last work,[21] there were not only essays by giants in the common law of contract but also essays by authors who were less well known but whose works were equally interesting and engaging.[22] More importantly, I also observed as follows:[23]

> I have no doubt that they were mentored by Professor Furmston who also utilised this book as a forum for them to showcase their work and (as importantly) their potential. Mentoring is tough work and requires a warm and kind heart.

10 On a personal level, Professor Furmston had been my colleague and friend for over three decades. His kindness and assistance when I embarked on a Singapore and Malaysian edition of *Cheshire, Fifoot and Furmston's Law of Contract* three decades ago were invaluable. At the very commencement of the project, he arranged for suitable accommodation for me and my wife at the University of Bristol where I spent part of my sabbatical leave and during which time I discussed the project with him in some detail. He was also a frequent visitor to Singapore and his kindness to me and my family cannot be described in mere words. And he loved teaching, having been ranked as one of the top ten law teachers in the world (in *The Times of London* of 6 October 2007). As I have recounted, "[o]ne of his life's aims was to teach for six decades. He achieved this milestone a couple of years ago."[24]

11 As already recounted above, he was also a mentor to many. This was not only a demonstration of his humanity but also of his humility. As also referred to above, mentoring is hard work and requires

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21 Andrew Phang, Book Review of Michael Furmston (Ed), *The Future of the Law of Contract* (Informa Law from Routledge, Oxford, 2020) (2021) 37 JCL 145.

22 Andrew Phang, Book Review of Michael Furmston (Ed), *The Future of the Law of Contract* (Informa Law from Routledge, Oxford, 2020) (2021) 37 JCL 145, 151.

23 Andrew Phang, Book Review of Michael Furmston (Ed), *The Future of the Law of Contract* (Informa Law from Routledge, Oxford, 2020) (2021) 37 JCL 145, 151.

24 Andrew Phang, "Obituary – Professor Michael Philip Furmston, 1 May 1933 – 28 June 2020" (2020) 36 JCL 201, 201.

a warm and kind heart. There is a vital life lesson to be learnt here, especially given the fact that academics do not always display such qualities. Indeed, true greatness, in my view at least, lies not in the level of one's intellect or in the quality of one's work (published or otherwise) – it lies, in the final analysis, in the lives we have touched for the better and this cannot, by its very nature, be measured, save perhaps in the "living legacy" embodied in the lives that have in fact been touched (and which, hopefully, pay it forward in the same fashion, by touching other lives in turn). Mere material and intellectual achievements pale in comparison.

12 I did mention that Professor Furmston was kind enough to autograph the then latest edition of *Cheshire, Fifoot and Furmston's Law of Contract* back in 1987. Three decades later, as I have also recounted elsewhere,[25] he presented me with an autographed copy of the seventeenth edition – hot off the press – during the *Journal of Contract Law* Conference held at Sunway University in May 2017. He was working in earnest on the eighteenth edition when he was suddenly taken from us during the early hours of 28 June 2020.

13 Turning to Professor Furmston's own background, this has – unlike that of the other contract law scholars considered in the present essay – been documented in more detail elsewhere[26] and I will therefore be relatively brief.[27]

14 Professor Furmston was born on 1 May 1933 in Wallasey, Merseyside. 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 in both his undergraduate law degree as well as in the Bachelor of Civil Law in 1956 and 1957, respectively. He also received a first in his Bar examination. Professor Furmston commenced his academic career as a lecturer in English law at the University of Birmingham and joined Queen's University Belfast as a lecturer in 1962. In 1964, he joined Lincoln College, University of Oxford, as a Fellow and was appointed University

[25] Andrew Phang, "Obituary – Professor Michael Philip Furmston, 1 May 1933 – 28 June 2020" (2020) 36 JCL 201, 202.

[26] Andrew Phang, "Theory as Practice and Practice as Theory – The Integrated and Integral Contract Scholarship of Professor Michael Furmston" (2014) 31 JCL 12.

[27] Indeed, I draw from Andrew Phang, "Obituary – Professor Michael Philip Furmston, 1 May 1933 – 28 June 2020" (2020) 36 JCL 201, 201.

Lecturer in 1965. He remained at the University of Oxford until 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. After a relatively short break, he was appointed founding Dean as well as Professor of Law at the School of Law of the Singapore Management University in 2007.[28] After retiring from the Singapore Management University in 2015, he joined Sunway University (where he was teaching as well as researching at the time of his passing) as a Professor of Law.

15 Professor Furmston has also been active as a consultant and practitioner. He appeared – most notably – in the leading House of Lords decision in *Ruxley Electronics and Construction Ltd v Forsyth*.[29] Appearing with Mr Bryan McGuire, they successfully persuaded the House to allow the appeal in favour of their clients.

16 Professor Furmston was on the Editorial Board of the *Journal of Contract Law* too. Significantly, his eightieth birthday coincided with the silver jubilee of that journal. In the *Editorial* to a special issue of the journal, the General Editor, Professor J W Carter, noted that "Michael's contributions by way of publication, refereeing and conference participation, have been second to none" and that "[t]he *Journal* owes him a great debt of gratitude".[30] I turn now to Professor Furmston's scholarship. However, before proceeding to do so, I pause to note that he had interests outside the law as well – he was an avid football, rugby, and cricket fan, and also played chess (he was on the Oxford chess team), underscoring the important fact that *we do need hobbies and personal interests outside the law as well*.

[28] Very recently renamed the Yong Pung How School of Law, in memory of and tribute to the second Chief Justice of post-independence Singapore.

[29] [1996] 1 AC 344; and see, especially, 349, where Professor Furmston's arguments before the court are set out. See also Andrew Phang, "Subjectivity, Objectivity and Policy – Contractual Damages in the House of Lords" [1996] JBL 362.

[30] *Editorial* to (2014) 31 JCL (Numbers 1 and 2).

B. The Scholarship

17 I have, once again, dealt with Professor Furmston's scholarship in quite great detail elsewhere, and the reader is referred to that particular essay (which spans some *44* printed pages).[31] It will suffice for present purposes to note what should already appear to be a fairly obvious point – that Professor Furmston's main contribution consists in his work on the various editions of *Cheshire, Fifoot and Furmston's Law of Contract* over a period of *over half a century*, commencing with his initial contribution to the book (then entitled *Cheshire and Fifoot's Law of Contract*) in 1964.[32] His name appeared on the title page of the book itself in the eighth edition (published in 1972) and, as already mentioned above, he took over the reins of this work completely in the very next (the ninth) edition (published in 1976). As also referred to above, on the occasion of the publication of the eleventh edition (in 1986), the title of the book itself was changed to include his name as well.

18 More importantly, this particular work has had a profound impact in a very real and practical way on the development of contract case law across the Commonwealth. I sought to demonstrate this by listing literally the hundreds of cases in this particular regard.[33] By way of summary, editions of the book which bears Professor Furmston's name have been cited – in the British Isles and the European Union – by the House of Lords (now the UK Supreme Court), the English Court of Appeal, the English High Court, the Judicial Committee of the Privy Council, the Northern Ireland Court of Appeal, the UK Employment Appeal Tribunal, the UK VAT and Duties Tribunal, the Northern Ireland High Court, the Republic of Ireland Supreme Court, the Republic of Ireland High Court and the Court of Justice of the European Communities.

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[31] Andrew Phang, "Theory as Practice and Practice as Theory – The Integrated and Integral Contract Scholarship of Professor Michael Furmston" (2014) 31 JCL 12. Ironically, perhaps, relatively more space is therefore devoted in the present essay to the other contract law scholars because there is (with the exception of Professor Coote) no similar detailed discussion as well as point of reference.

[32] Andrew Phang, "Theory as Practice and Practice as Theory – The Integrated and Integral Contract Scholarship of Professor Michael Furmston" (2014) 31 JCL 12, 17–28.

[33] Andrew Phang, "Theory as Practice and Practice as Theory – The Integrated and Integral Contract Scholarship of Professor Michael Furmston" (2014) 31 JCL 12, 46–53.

19 In Oceania, the book has been cited by the High Court of Australia, the Federal Court of Australia, the New South Wales Court of Appeal, the Supreme Court of New South Wales, the New Zealand Supreme Court, the New Zealand Court of Appeal as well as the New Zealand High Court.

20 In Canada, the book has been cited by the Supreme Court of Canada, the Federal Court of Appeal (Ontario), the Federal Court of Canada, the British Columbia Court of Appeal, the Ontario Court of Appeal, 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 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 Manitoba Court of Queen's Bench, the Saskatchewan Court of Queen's Bench, the Saskatchewan Labour Relations Board, the Nova Scotia Supreme Court, the Nova Scotia Small Claims Court, the Newfoundland and Labrador Supreme Court, the Newfoundland and Labrador Provincial Court, the Prince Edward Island Supreme Court, the New Brunswick Court of Queen's Bench, the Northwest Territories Supreme Court, the Yukon Territory Supreme Court, the Tax Court of Canada and the Canada Arbitration Board.

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

22 Last but not least, in Asia, the book has been cited by the Supreme Court of India, the Hong Kong Court of First Instance, the Hong Kong High Court, the Hong Kong District Court, the Federal Court of Malaysia, the Malaysian Court of Appeal, the Malaysian High Court, the Singapore Court of Appeal and the Singapore High Court.

23 Professor Furmston edited and/or authored or co-authored a fair number of other books as well.[34] Perhaps the most significant is *The Law of Contract* – an important volume in the Butterworths Common Law Series.[35] Professor Furmston was both the General Editor of, and contributor to, this work. Another important book (co-authored with Professor G J Tolhurst and Assistant Professor Eliza Mik as a specialist contributor on the important topic of the formation of online contracts) is *Contract Formation – Law and Practice*.[36] There is also the well-known casebook on contract law co-authored by Professor Furmston, Professor H G Beale and Professor W D Bishop; it is entitled *Contract – Cases and Materials*.[37] In addition, Professor Furmston was an expert in construction law and, in this regard, reference may be made to *Powell-Smith and Furmston's Building Contract Casebook*[38] as well as the *Construction Law Reports* (the latter of which were edited by Professor Furmston for many years).

24 Not surprisingly, Professor Furmston also published many articles, comments and essays. What struck me was the enormous variety and diversity of areas covered.[39] Indeed, in my essay on Professor Furmston, I dealt with a sampling of these publications and the reader is referred to that discussion.[40] It suffices for present purposes to note that Professor Furmston was a legal polymath whose scholarship is of the first rank. Not surprisingly, books which he co-authored and

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34 Andrew Phang, "Theory as Practice and Practice as Theory – The Integrated and Integral Contract Scholarship of Professor Michael Furmston" (2014) 31 JCL 12, 29–30.

35 Presently in its sixth edition (LexisNexis, 2017), with the first edition being published in 1999.

36 Oxford University Press, 2010.

37 Butterworths, 5th Ed, 2008. In so far as other areas of contract and commercial law are concerned, see, *eg*, Michael Furmston, *Sale & Supply of Goods* (Cavendish Publishing Limited, 3rd Ed, 2000) as well as Michael Furmston and Jason Chuah, *Commercial and Consumer Law* (Pearson Education Limited, 2010).

38 Wiley-Blackwell, 5th Ed, 2012.

39 Andrew Phang, "Theory as Practice and Practice as Theory – The Integrated and Integral Contract Scholarship of Professor Michael Furmston" (2014) 31 JCL 12, 31–32.

40 Andrew Phang, "Theory as Practice and Practice as Theory – The Integrated and Integral Contract Scholarship of Professor Michael Furmston" (2014) 31 JCL 12, 32–44.

edited, as well as his articles, have been cited by the courts.[41] As I observed, in my *Conclusion* to the aforementioned essay:[42]

> 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. It is at once both scholarly and 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 citation of his work by the courts — especially of *Cheshire, Fifoot and Furmston's Law of Contract* — is staggering, given the citations literally across the globe and the sheer number of cases which have cited his work. 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 it was even possible).
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> 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.

[41] Andrew Phang, "Theory as Practice and Practice as Theory – The Integrated and Integral Contract Scholarship of Professor Michael Furmston" (2014) 31 JCL 12, 53–54.

[42] Andrew Phang, "Theory as Practice and Practice as Theory – The Integrated and Integral Contract Scholarship of Professor Michael Furmston" (2014) 31 JCL 12, 54–55.

> All this would be sufficient to justify his status as one of the top legal scholars of both the 20th and 21st 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.

III. Professor Guenter Treitel

A. The Person

25 As mentioned earlier, I did not really have any personal contact with Professor Treitel. However, when he retired as Vinerian Professor of English Law at the University of Oxford in 1996, I felt compelled to send a short e-mail to thank him for his scholarship and to wish him a happy retirement.[43] If I might digress into a life lesson, I did this because of an incident (or, rather, "non-incident") that had taken place some years back. In 1988, and as still a fledgling teacher in the jurisprudence course, I suddenly took it upon myself to write to that great doyen of jurisprudence, Professor H L A Hart. I must state that I did not expect an answer as I was an unknown lecturer teaching in faraway Singapore.[44] That is why when I received a letter with my name and address neatly written with what was clearly a fountain pen (by even then, something of a rarity), I was puzzled for a moment as to whom it was from. To my great (albeit very pleasant) surprise, it was a letter from Professor Hart himself! It was written on personal note paper which had

[43] It was also the occasion for the publication of a *Festschrift* in his honour: F D Rose (Ed), *Consensus ad Idem – Essays on Contract in Honour of Guenter Treitel* (Sweet & Maxwell, 1996).

[44] I had the same experience when I wrote to Lord Denning, enclosing some of my articles (which I thought that he might find of interest). To my great (and again very pleasant) surprise, he replied personally, followed by a more detailed letter which was typed by his Personal Assistant. It was all the more astonishing to receive his first (and handwritten) letter as he was by then registered blind. It was therefore a great honour and privilege to have been invited to participate in the Symposium celebrating his one-hundredth birthday (as to which see the text to n 16, above).

his return address, above which was written: "from Professor H L A Hart". The letter itself comprised a couple of pages, responding to my various observations and queries on his as well as Professor Ronald Dworkin's and Professor Lon Fuller's work, as well as to my enquiry on when his response to his various critics would be published. It consisted of closely written paragraphs in extremely neat handwriting. He thanked me for my kind words about his work before providing his substantive responses. One of those responses furnished me with sufficient courage to submit my first article on jurisprudence. It was subsequently accepted and published in a legal philosophy journal.[45] I did write to Professor Hart to thank him but when the opportunity arose sometime later to visit him at the University of Oxford whilst I was on sabbatical leave at the University of Bristol (as I have referred to earlier), I just felt that it would be an intrusion as well as an imposition to visit such an august scholar although I had been told by a colleague of his that he was not well. Shortly after I returned to Singapore after my sabbatical leave, I learnt the sad news that Professor Hart had passed away. I must confess that I felt more than a little regret at not visiting him and thanking him personally for his kindness to a young overseas lecturer. There is a lesson here – and that is that life is finite and that we must not delay doing what we ought to do. And this applies to *every* facet of our lives. Indeed, where we have disagreements within our family, we should try to make peace before it is too late. This particular experience taught me to never hesitate again in doing what I ought to do. Indeed, a few years later, when I was once again on sabbatical leave at Harvard Law School as a Visiting Scholar, I visited a Professor who was always kind to foreign students and who was *the* expert on (and father of) securities regulation (an enormously complex and difficult topic) [46] –

[45] Andrew Phang, "Jurisprudential Oaks from Mythical Acorns: The Hart-Dworkin Debate Revisited" (1990) 3 Ratio Juris 385. The main point that I sought to make in that particular article was that Professor Dworkin was, with respect, wrong in arguing, *inter alia*, that Professor Hart had omitted to consider the concept of "principles" and had focused, instead, only on the concept of "rules".

[46] The *Oxford English Dictionary* credits with him with having coined the word "tippee": see *The Oxford English Dictionary* (Prepared by J A Simpson and E S C Weiner, Clarendon Press, 2nd Ed, 1989), 135, where a "tippee" is described as "[o]ne who receives inside information about a company or business enterprise and uses it to trade profitably in stocks and shares" and (more importantly) where volume 3 of Professor Loss's treatise, *Securities Regulation*, is cited. His magisterial multi-volume treatise on securities regulation is still the leading work in the field. I was fortunate to be one of the first batches of students to have studied from his then newly-published one-volume work that distilled the essence of his multi-volume treatise. However, even that work was voluminous and quite daunting!

Professor Louis Loss.[47] I had only read his securities regulation course (as part of the course requirement for the Doctor of Juridical Science at Harvard Law School) because of my very pleasant experience in his Corporations Law course the previous academic year (when I was reading for the Master of Laws at the same Law School). During my sabbatical leave, Professor Loss was already quite ill and moved around in a wheelchair; but he was an extremely determined man and came to the office virtually every day. I was determined to greet him but was quite unprepared for the rather emotional meeting that followed. Suffice it to state for the present that, leaving the details aside, I was so glad that I had taken the effort to meet him. Sadly, he passed away about two years later.

26 Viewed against the backdrop just described, when I heard that Professor Treitel was retiring and given the fact that I would not be travelling abroad for some time, I decided that the next best approach was to send him an e-mail to thank him for all his scholarship as well as to wish him a happy retirement. Once again, I was not, in the circumstances, expecting any response and I was therefore pleasantly surprised to receive a reply from Professor Treitel which was brief but extremely cordial. But that was the extent of my personal contact with him. I turn now to some background information on Professor Treitel himself.

27 Perhaps the most comprehensive background on Professor Treitel can be found in his own writings on his life and academic career.[48] There is also an excellent biographical memoir of

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[47] William Nelson Cromwell Professor of Law Emeritus, Harvard Law School. See also Louis Loss, *Anecdotes of a Securities Lawyer* (Little, Brown and Company, 1995).

[48] Guenter H Treitel, "A German Childhood 1933 – 1942: Persecution and Escape" (2020) 28 Zeitschrift für Europäisches Privatrecht 591 and, by the same author, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130. Whilst dealing with his childhood, the former essay was published later. We are told by Professor Francis Reynolds that it "was left in typescript, not to be opened during his life, on the basis that 'my memorialist may find it useful': though much of the contents was in fact delivered by him orally at a Jewish meeting in Oxford some years before the end of his life, and this is still (or recently was) available on the web"; it was later published "on the initiative of Professor Reinhard Zimmermann, who obtained permission from the family to do so, on the ground that too few people in Germany at the present day were aware of the extent to which Jewish people were discriminated against, humiliated and worse in that country during the late 1930s": Francis Reynolds, "Guenter Heinz Treitel, 28 October 1928 – 14 June 2019" (2020) 19 Biographical Memoirs of Fellows of the British Academy 129, 131.

Professor Treitel by Professor Francis Reynolds.[49] Indeed, Professor Reynolds summarises Professor Treitel's life and legacy most accurately and succinctly in the abstract to his memoir, as follows:[50]

> Sir Guenter Treitel came to England as a German refugee on the 'Kindertransport' in 1939 and became a pillar of the Oxford Law Faculty, ending up as Vinerian Professor of English Law, Fellow of All Souls (previously having been a Fellow of Magdalen) and a very distinguished member of the legal academic world in the United Kingdom, who also maintained extensive connections with Law Schools in the United States. He will be remembered for a huge corpus of authoritative writings on commercial law, some of them opening up new areas, and all marked by extreme accuracy, clarity and close and careful attention to doctrine.

28 What I would like to do is to draw, primarily from his writings, some life lessons from the life and distinguished career of Professor Treitel himself.

29 Professor Treitel was born into a Jewish family on 28 October 1928 in Berlin. His father and his father's eldest brother practised as lawyers, whilst his father's uncle had been a Prussian judge of high rank.[51] Indeed, he observed that "[his] destiny as a lawyer had [as a result] been settled some years" before he was born.[52] Unfortunately, with the Nazi seizure of power in Germany in 1933, "[a] more immediate consequence of that upheaval was the need to find a place of refuge from the increasing severity of Nazi persecution in Germany".[53] As already noted briefly above, "in March 1939, [he] had the good fortune to be admitted to the United Kingdom under the well-known *Kindertransport*

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49 Francis Reynolds, "Guenter Heinz Treitel, 28 October 1928 – 14 June 2019" (2020) 19 Biographical Memoirs of Fellows of the British Academy 129.

50 Francis Reynolds, "Guenter Heinz Treitel, 28 October 1928 – 14 June 2019" (2020) 19 Biographical Memoirs of Fellows of the British Academy 129, 130.

51 Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 130.

52 Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 130.

53 Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 131.

transport scheme[54] and to be accommodated in a hostel in London which owed its existence to the kindness, the generosity and the humanitarian instincts of the Sainsbury family[55]";[56] many decades later, he was one of five persons invited to deliver a short speech before a concert to be given in celebration of the life of the late Sir Robert Sainsbury.[57] Together with his brother, Professor Treitel arrived in England on 24 March 1939 and, fortunately, his parents and sister were also able to join them in mid-July 1939, six weeks before the beginning of the Second World War.[58] Attending school in England, he fell in love with literature in general and the works of Jane Austen in particular;[59] indeed, many years later, he wrote an article on Jane Austen and the law which (perhaps fittingly) was published in the centenary volume of the *Law Quarterly Review*.[60] He proceeded to read law at Magdalen College at the University of Oxford. Interestingly, the *viva voce* entrance examination was conducted by the famous Christian writer (and then only English tutor at Magdalen College), C S Lewis, and J H C (John) Morris (then the only law tutor at Magdalen College and who was to become a famous scholar in the conflict of laws[61]).

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54 This scheme was "under the auspices of a philanthropic organization in Bloomsbury called the Refugee Children's Movement" and "was set up in recognition of the fact that the admission of children could be treated as a special case, not only on humanitarian grounds, but also for more practical reasons, such as that children would not be thrown, at least at once, on to what was then a difficult labour market; and that they could be assimilated with relative ease into British society": Guenter H Treitel, "A German Childhood 1933 – 1942: Persecution and Escape" (2020) 28 Zeitschrift für Europäisches Privatrecht 591, 602.

55 Indeed, upon his arrival in England, his original sponsors had rejected him on the ground of mistaken identity but he was saved by the subsequent sponsorship of the Sainsbury Home in Putney. This Home was set up by the sons of the founder of the famous Sainsbury's grocery chain: Guenter H Treitel, "A German Childhood 1933 – 1942: Persecution and Escape" (2020) 28 Zeitschrift für Europäisches Privatrecht 591, 610−611.

56 Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 131.

57 For the text of the speech, see Guenter H Treitel, "A German Childhood 1933 – 1942: Persecution and Escape" (2020) 28 Zeitschrift für Europäisches Privatrecht 591, 616−617.

58 Guenter H Treitel, "A German Childhood 1933 – 1942: Persecution and Escape" (2020) 28 Zeitschrift für Europäisches Privatrecht 591, 610, 612.

59 Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 132.

60 G H Treitel, "Jane Austen and the Law" (1984) 100 LQR 549. I was particularly intrigued as well as interested by this article, having also read as well as studied Jane Austen's novels whilst in school.

61 Peter North, "John Humphrey Carlile Morris 1910–1984" (1988) 74 Proceedings of the British Academy 443.

30 His legal studies began during the Michaelmas term of 1946[62] with tutorials from Rupert (later Sir Rupert) Cross[63] (who was to become one of the leading academic experts in the law of evidence in England).[64] Interestingly, Professor Treitel was – more than three decades later – the successor to Sir Rupert Cross in so far as the prestigious Vinerian Chair was concerned. Not surprisingly (and despite his candid confession that his initial encounter with his law studies was by no means easy[65]), he graduated with first class honours and proceeded to read for the Bachelor of Civil Law degree (which he also successfully completed with first class honours). He later entered legal academia – first at the London School of Economics, on the recommendation of Professor Cross to the famous company law expert, Professor L C B Gower.[66] He did weigh the pros and cons of becoming a legal academic – not being subject to "the fluctuating needs of clients", the freedom and flexibility of academic discourse, and the joy of teaching and writing about the law on the one hand but having to proof-read, examine and discharge administrative duties on the other.[67] It was also of more than passing interest to me that Professor Treitel also had lunchtime conversations with, *inter alia*, Professor H L A Hart, "who seemed to be trying out on [him] a set of ideas entirely new to [him]";[68] he then proceeded to observe thus:[69]

> It was not until some years later that I realised that his discourse reflected the early drafts of his great work on 'The Concept of Law', that was to be published in 1961.

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62 He acquired British nationality in November 1947: Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 133 and, by the same author, "A German Childhood 1933 – 1942: Persecution and Escape" (2020) 28 Zeitschrift für Europäisches Privatrecht 591, 614.

63 G H Treitel, "Obituary – Sir Rupert Cross" (1981) 1 LS 115 and H L A Hart, "Arthur Rupert Neale Cross 1912–1980" (1985) 70 Proceedings of the British Academy 405.

64 Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 134.

65 Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 135.

66 Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 140.

67 Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 150.

68 Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 146.

69 Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 146.

31 I found it extremely interesting that Professor Treitel's initial (and main) research interest "lay in the law of evidence, an interest generated by the tutorials in that subject which Rupert Cross had given [him] in [his] years as a B.C.L. student".[70] This led to an article on the presumption of death, which was published in the *Modern Law Review*[71] – which, I should add, I in fact cited (as "a seminal article") in a judgment as a first instance judge, now many years ago,[72] and which was also the subject of academic comment by my former contract, evidence and jurisprudence lecturer.[73] If I may digress, as it turned out, I was correct in not granting the applicant the order sought declaring that her father was dead; it transpired that he had still been alive at that point. Sadly, he passed away alone in Puerto Rico many years later and was the subject of a news story in the local newspaper.[74] I later found out that the lawyer who had acted for the applicant, a former student of mine, had done so *pro bono*. So there is a more than fleeting connection for me in so far as Professor Treitel's article is concerned. Although this particular article was "intended to be one of a trilogy of articles on presumptions, [his] interests shifted so that the other two (on the presumption of marriage and the presumption of legitimacy) were never written".[75] The main reason for this shift was that Professor Cross had already begun work on his famous treatise on the law of evidence, and he therefore "turned in the direction of contract".[76] However, his first book project was not – as many would have assumed – his magisterial treatise on the law of contract; it was, instead, a contribution to that great practitioner's work on the conflict of laws, *Dicey's Conflict of Laws*, and was written in response to an invitation by John Morris who was (in turn) tasked with revamping the work; the work would, of course, subsequently be renamed *Dicey and Morris on the Conflict of Laws*.[77]

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70 Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 142.

71 G H Treitel, "The Presumption of Death" (1954) 17 MLR 530.

72 *Re Wong Sook Mun Christina* [2005] 3 SLR(R) 329, [29] and [46].

73 Chin Tet Yung, "Death by Disappearance – As Good As Dead?" [2005] Sing JLS 416.

74 *Sunday Times*, 21 July 2013, 10–11. A follow-up story records that his daughters did, in fact, plan to travel to Puerto Rico to claim their father's body: *Sunday Times*, 28 July 2013, 17.

75 Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 142.

76 Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 149.

77 The work was subsequently renamed *Dicey, Morris and Collins on the Conflict of Laws* (which remains the present title of this work).

Professor Treitel took the opportunity to write to Mr Hilary Stevens (of the legal publisher, Stevens & Sons Ltd) as the new edition of *Dicey's Conflict of Laws* had been "published under the Stevens imprint", offering a new book of *Privity of Contract*.[78] That proposal was, however, unsuccessful – not surprisingly, because of the limited market for such a work. To his great surprise, though, Professor Treitel was asked – over a "lavish and luxurious" lunch – whether he might want to write a book on the law of contract instead.[79] This was, of course, the "birth" of *Treitel on the Law of Contract* (which I will say a few words on in the next section of this essay).

32 It is also interesting to note that his next article, after that on the presumption of death noted in the preceding paragraph, was in fact *rejected* by the editor of the *Law Quarterly Review.* It was on the Infants Relief Act 1874.[80] When I initially read about this in Professor Treitel's essay, I was surprised because I had remembered reading as well as citing it and also distinctly recalled that it had been published in the *Law Quarterly Review*.[81] As it turns out, the article was indeed rejected initially. However, after obtaining a lectureship at University College at the University of Oxford, Professor Treitel was asked by the Master of that college, Professor Arthur Goodhart (who also happened to be the editor of the *Law Quarterly Review*), whether he (Professor Treitel) had anything that he could send him for publication in that journal. In Professor Treitel's own words:[82]

> I replied that I had nothing except the article on the Infants Relief Act 1874, which he had rejected the previous year. He said that he had no recollection of having done so and asked me to send the piece to him again. Shortly after my having done so, he sent me a note to the effect that it was 'the best thing [he] had

[78] Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 151.

[79] Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 151.

[80] Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 142.

[81] G H Treitel, "The Infants Relief Act, 1874" (1957) 73 LQR 194. There was, in fact, a follow-up article: G H Treitel, "The Infants Relief Act, 1874 – A Reply" (1958) 74 LQR 97.

[82] Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 145–146.

> ever seen' on the topic, and that he would be pleased to publish it. I wonder how many young legal academics have shared this experience of having the same piece first rejected and then published by the same editor of the same journal.

33 As already mentioned above, Professor Treitel ultimately succeeded Professor Cross to the Vinerian Chair.[83] However, this was not without some prior disappointment when his application for the Oxford chair in English law was unsuccessful, Professor Patrick Atiyah being appointed to that chair instead (an event to which I shall return below).[84] His disappointment was great; as he put it:[85]

> This was a severe disappointment to me; it was assuaged only when, nearly two years later, I was offered, and accepted, the Vinerian Chair.

34 Indeed, Professor Treitel had not, in fact, applied for the Vinerian Chair:[86]

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[83] He also happened to pen an Obituary on him: G H Treitel, "Obituary – Sir Rupert Cross" (1981) 1 LS 115.

[84] "After he had come back to England [from Australia] he was perceived as having, and probably had, an uneasy relationship with Atiyah, though I myself never heard either of them refer to it in anything but discreet terms … In fact they were two people whose intellectual methods were totally dissimilar directing themselves (in Atiyah's case, not exclusively) to the same area.": Francis Reynolds, "Guenter Heinz Treitel, 28 October 1928 – 14 June 2019" (2020) 19 Biographical Memoirs of Fellows of the British Academy 129, 141 (see also 142). And *cf* their famous *academic* debate in relation to the doctrine of consideration: P S Atiyah, *Consideration in Contracts: A Fundamental Restatement* (ANU Press, 1971; reprinted as "Consideration: A Restatement" in Essay 8 in P S Atiyah, *Essays on Contract* (Clarendon Press, 1986) (this was, in fact, Professor Atiyah's inaugural lecture after accepting a chair at the then College of Law at the Australian National University (James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 158))) and G H Treitel, "Consideration: A Critical Analysis of Professor Atiyah's Fundamental Restatement" (1976) 50 ALJ 439. And for an academic *collaboration*, see P S Atiyah and G H Treitel, "Misrepresentation Act 1967" (1967) 30 MLR 369. It would appear, however, from at least *Professor Atiyah's* perspective that the rift between him and Professor Treitel was rather more serious: James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 174 (and citing from Ch 12 of Professor Atiyah's unpublished autobiography entitled *An Academic Autobiography*).

[85] Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 162.

[86] Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 163.

> I had not applied for this Chair: it seemed pointless to do so in view of my recent unsuccessful application for the other Chair of English Law at Oxford; and I certainly did not want to trouble my referees again. Needless to say, I accepted the invitation.

35 It might be further noted that he was conferred the degree of Doctor of Civil Law in 1976, was elected as a Fellow of the British Academy in 1977, took silk in 1982, and was elected an Honorary Bencher of Gray's Inn that same year.[87] He was also a Trustee of the British Museum as well as a Member of the Council of the National Trust.[88] He was knighted for his services to the law in 1997.[89] He continued with his scholarly writings after his retirement[90] and "died four months before his ninety-first birth day, [on 14] June 2019, by reason of complications that set in after a head injury".[91] A committed legal scholar right to the very end, "[c]onversation[s] with him some months before his death suggested that he had not then entirely given up the possibility of another edition of *Frustration and Force Majeure*", as Professor Reynolds notes.[92]

36 Drawing some *life lessons* from the above account, the first (and perhaps most general) one is perhaps an obvious one – that *life is unpredictable and uncertain, although there is a sense in which we each have our own destiny.* That this is so is clear from the life of Professor Treitel himself. Although some readers may think that life is in fact random, my personal view is that one's life is a mysterious interaction of both individual free will on the one hand and wider circumstances beyond our control on the other. This is demonstrated in the life and career of Professor Treitel as briefly recounted above. That

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87 Francis Reynolds, "Guenter Heinz Treitel, 28 October 1928 – 14 June 2019" (2020) 19 Biographical Memoirs of Fellows of the British Academy 129, 148.

88 Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 168–171.

89 Francis Reynolds, "Guenter Heinz Treitel, 28 October 1928 – 14 June 2019" (2020) 19 Biographical Memoirs of Fellows of the British Academy 129, 148.

90 Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 171–176.

91 Francis Reynolds, "Guenter Heinz Treitel, 28 October 1928 – 14 June 2019" (2020) 19 Biographical Memoirs of Fellows of the British Academy 129, 148.

92 Francis Reynolds, "Guenter Heinz Treitel, 28 October 1928 – 14 June 2019" (2020) 19 Biographical Memoirs of Fellows of the British Academy 129, 148.

he was saved from possible death had he remained in Germany and, having landed on the shores of the United Kingdom, was to become one of the leading legal scholars in a fundamental area of the common law seems not to be just a random result or coincidence. This appears to be buttressed by the many apparent "micro-coincidences" that occurred specifically within his own career in legal academia (culminating, as we have seen, in the assumption of the Vinerian Chair from an important as well as accomplished mentor) – all of which would, taken collectively, have had to surmount relatively great mathematical odds and probabilities in order to qualify as pure coincidence. That he would, however, have had to make vital choices along the way as well as put in his own hard work was of the first importance as well.

37 As was also the case with Professor Furmston, Professor Treitel's immense stature as a legal scholar was matched only by his *humility and candour*. Indeed (and as we have seen), he was candid about the difficulties that he had faced initially as a law student as well as the fact that an article of his had originally been met with rejection.[93] Although this might, once again, appear to be an obvious quality, might I suggest that it is not – particularly when viewed in light of the reluctance of many persons to demonstrate weakness in any way. Speaking for myself, I have never flinched from admitting that I do not know something not only because that is the best way to learn but also because it is the right thing to do. It is heartening to note that such an approach had also been adopted by one of the great contract scholars of our time. As a law professor, he was described as being "polite and considerate and [he] never talked down to or patronised his students".[94] And Professor Anne Davies, the then Dean of the Oxford Law Faculty, concluded her remembrance of Professor Treitel thus:[95]

> Although Treitel will be remembered principally for his great scholarly achievements, he was a modest and kindly person, always ready with a word of wise

[93] Although, as we have seen, it could be argued that it was only a "technical" rejection since that same article was later accepted for publication in the *same* journal that had rejected it in the first instance.

[94] Francis Reynolds, "Guenter Heinz Treitel, 28 October 1928 – 14 June 2019" (2020) 19 Biographical Memoirs of Fellows of the British Academy 129, 146.

[95] "Guenter Treitel 1928–2019", 19 June 2019, available online at https://www.law.ox.ac.uk/news/2019-06-14-guenter-treitel-1928-2019 (accessed, 4 May 2021).

> advice for younger colleagues expressed in the mildest terms. He will be much missed.

38 Professor Treitel's special interest – I would put it as a hobby – in relation to the works of Jane Austen also reminds us that, important as our work is (and to which we should apply ourselves in the fullest measure), our work does not (and ought not to) define us. As already noted with regard to Professor Furmston, *we do need hobbies as well as personal interests*, and Professor Treitel's specific interest resonated with me because there has been one particular book that has stayed with me for almost half a century and I, too, would like to explore the legal as well as extra-legal lessons contained therein after I retire from the Bench.

39 Finally, there was one particular incident (not recounted above) which demonstrates Professor Treitel's *humanity and humour*. In an almost passing reference, he mentions a humorous incident at the Law Library of the University of Western Australia at which he was a visiting professor, as follows:[96]

> The Law School's Library contained a first edition of *Anson on Contract* with the name of A.V. Dicey[97] written on the flyleaf. I was gravely tempted to abstract this precious volume and restore it to All Souls; but I am happy to say that, in spite of Oscar Wilde, I resisted the temptation.

40 I must confess that I, too, have a weakness for books in general and first editions of certain books in particular. I recall Professor Furmston stating that he had every edition of *Cheshire and Fifoot's Law of Contract* (including all the overseas editions) as well as first editions of other leading contract textbooks (including *Anson on Contract*). Although I managed to locate first editions of both *Cheshire and Fifoot's Law of Contract* and Professor Treitel's *The Law of Contract*, I have had to be satisfied with owning a facsimile copy of the first edition of *Anson on Contract* (particularly since it was first published in 1884)!

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[96] Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 162.

[97] Albert Venn Dicey was an extremely distinguished jurist and constitutional theorist.

41 Let us turn now to a brief consideration of Professor Treitel's scholarship.

B. The Scholarship

42 The work for which Professor Treitel is most well known is, of course, his magisterial treatise, *The Law of Contract*, which was first published in 1962.[98] Under his pen, eleven editions were produced. His colleague at the University of Oxford, Professor Edwin Peel, took over the work with effect from the twelfth edition (published in 2007); it has since been (aptly) known as *Treitel on the Law of Contract*.

43 It is interesting to note why Professor Treitel decided to embark on this book project in the first place. He referred to two reasons. The first was that he "was not entirely satisfied with the treatment of [the subject], admirable though it was, … in other books on English contract law".[99] His second reason was that he had "hoped to raise the level of academic discourse in the subject",[100] an objective which he undoubtedly fulfilled. He also observed thus:[101]

> A common criticism was that the book would suit only the abler students; but this was not a point which (if sound) troubled me: most law students, if told that they were not clever enough to read a particular book, would rise to the challenge.

44 However (and respectfully), the book was, as alluded to earlier in the present essay (and in spite of Professor Treitel's comments, just quoted), still somewhat beyond the reach of the average law student. Speaking personally, it posed many *normative* questions and was certainly not a text to which a student who desired a merely *descriptive* account of contract law would refer. To be sure, one should not draw a sharp distinction between what the law is and what the law ought to be.

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98 Published by Steven and Sons.

99 Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 152.

100 Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 152.

101 Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 153.

However, in the psyche of the first-year law student, what is required is an at least rough account of what the law is before progressing to consider what the law ought to be in light of the critique of the current state of the law. Again, speaking on a purely personal level, *Treitel on the Law of Contract* did, in fact, develop – with each passing edition – into something quite *different* from that which I had experienced as a student. Over the decades, the book not only grew quantitatively but also began to evolve into a *practitioner's text*.[102] Although *Chitty on Contracts* has traditionally been (and still is) considered to be the leading practitioner's text, it is even more voluminous than *Treitel on the Law of Contract*. Perhaps more importantly, the normative critique of the law which proved to be tough going for the student is, in my view, eminently suitable for the enterprising practitioner who wishes to steal a legal march on his opponent by submitting to the court a persuasive legal argument that does not tread the traditional legal path. This is why I find it puzzling when legal academics describe Professor Treitel as being a "black letter lawyer" – often in tones that are not, in fact, complimentary. Inherent in such a view is the at least implicit claim that legal theory trumps legal doctrine (or "black letter law"). With respect, such a view smacks of arrogance and conceit. Lawyers and law students *need* to know how to read as well as analyse legal cases, not least because this is their proverbial bread and butter.[103] Law schools which neglect legal doctrine do their students a rank disservice. This is not to state, however, that theory and/or theoretical or conceptual methodology are irrelevant – far from it. As I observed elsewhere:[104]

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[102] See also Francis Reynolds, "Guenter Heinz Treitel, 28 October 1928 – 14 June 2019" (2020) 19 Biographical Memoirs of Fellows of the British Academy 129, 136, where the learned author observes as follows:

> Use of books by students depends to some extent on the recommendations of particular lecturers and tutors, but it seems likely that the book [*ie*, *Treitel on Contract*], while certainly holding, and retaining under its present editor, its authoritative reputation, is principally respected as an ultimate source of guidance by lawyers arguing before appellate tribunals.

[103] And as one author put it, the book's "technique involves a detailed and exhaustive but succinct and clear examination of doctrine, involving the closest examination of case law … and constant querying of generalisations, great and small, which on scrutiny are exposed as rather facile or even misleading" and also that "[f]or a long time the book held, and probably still holds, the reputation of an ultimate source of analysis at the highest level": Francis Reynolds, "Guenter Heinz Treitel, 28 October 1928 – 14 June 2019" (2020) 19 Biographical Memoirs of Fellows of the British Academy 129, 135.

[104] Andrew Phang, "The Law of Remedies – The Importance of Comparative and Integrated Analysis" (2016) SAcLJ 746, 757–758 (emphasis in the original text). Although these observations were made in the context of the law of remedies, they are of more general application as well.

> Indeed, in novel situations, the need for conceptual analysis from first principles is often of the first importance. More specifically, there are also valuable and interesting analyses in the law of remedies from a more theoretical standpoint. It is also clear that the very concept of a 'university' signals (as the very word itself embodies) the need for *unity in diversity*, in order that no one mode of scholarship becomes the dominant one to the exclusion of all others. However, there is a sense in which a purely abstract piece can serve no purpose other than to obfuscate (even if it appears to be learned). Even worse is a tightly knit community of legal scholars who speak in a 'language' which is of interest only to themselves and which is of no earthly use beyond the confines of their 'legal commune' – and it would be all the more the pity if these legal scholars actually possessed the innate intelligence to apply their minds to more practical issues. Indeed, by focusing inwards only upon themselves to the exclusion of the participation of others would be the very *antithesis* of the need for *unity in diversity* that was just referred to. Fortunately, though, if the Singapore experience is anything to go by, the undesirable traits in legal scholarship just mentioned are the exception rather than the rule.

45 To the above observations, perhaps I could add that an understanding of history is also a useful quality to inculcate in the law student (in addition to proficiency in both doctrine and theory). Interestingly, Professor Treitel dealt precisely with the issue of disagreements over discourse in legal scholarship in general and in "black letter law" in particular; in his words:[105]

> More seriously, I began to be perturbed at the lack of tolerance which was increasingly evident in some leading American Law Schools of failure to adhere to

[105] Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 168.

> this or that theory which was perceived as being the only one in which academic discourse was to be conducted. My later visits to the United States tended to be to places where such factionalism did not prevail. I was also perturbed by the criticism, from adherents of such schools of thought, of so-called 'black letter law'. This concept seemed to me to be a sort of Aunt Sally[106] – an invention of the critics which was easy enough to demolish but which bore no relation to reality. I had long been convinced that the common law was a highly sophisticated instrument which, in its practical application was totally different from the 'black letter law' invented by such critics.

46 I have already referred above to the incredible extent to which *Cheshire, Fifoot and Furmston's Law of Contract* has been cited across the globe. I have not had the opportunity to undertake the same exercise in relation to *Treitel on the Law of Contract*, although I would not be in the least surprised if such an exercise were to result in a similar outcome. Indeed, a cursory check on LawNet[107] revealed that Professor Treitel's work has been cited in over a hundred Singapore and Malaysian cases.[108]

47 Professor Treitel authored many articles and case notes as well. He was also either contributor to or sole author of many other books and monographs. An important comparative work that he authored is *Remedies for Breach of Contract*.[109] Another influential book is *Frustration and Force Majeure*,[110] which he enjoyed writing, with "one of the points of the book being to promote interest in intra-common law comparisons as a free-standing topic of academic interest".[111] In addition, he contributed important chapters to various editions of *Chitty on Contracts* and *Benjamin's Sale of Goods*. Another book, *Carver on Bills*

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106 *Ie*, a strawman argument.

107 On 27 April 2021.

108 See also above, n 76.

109 Aptly sub-titled "A Comparative Account", and published by Clarendon Press, Oxford, 1988. Unfortunately, because of financial constraints limiting access to relevant materials at the time, a second edition was not produced: Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 172.

110 Sweet & Maxwell, 1994; the latest edition is the third, published in 2014.

111 Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 173.

of Lading, [112] was co-authored with Professor Reynolds. Professor Treitel also delivered the Clarendon Lectures in Law in 2001; these lectures were later published as *Some Landmarks of Twentieth Century Contract Law*,[113] which was the subject of a review essay by myself in the *Journal of Contract Law*.[114]

48 What is of particular interest to me was Professor Treitel's delight that his work had been cited by the courts:[115]

> I have been gratified to see that [*Frustration and Force Majeure*] has proved useful in the Courts and has even received praise from the Court of Appeal in terms that I should scarcely have dreamt of when I started to write law books.[116]

49 I am in entire agreement with such a sentiment; indeed, I recently had occasion to observe, in a similar vein (albeit extra-judicially), thus:[117]

> There was one other ideal which I constantly attempted to realise [when I was a legal academic] – that my legal writings would (in some small way) constitute a practical contribution to the profession. Therefore, when I left one university to join another two decades ago, I saved only a couple of law reports in which my work had been cited by the Singapore courts (as there was insufficient justification to transport the rest to my new place of work). Little was I to know that I was later to join the Bench and assist directly in the development of Singapore law.

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112 Sweet & Maxwell, 2001. The latest edition is the fourth, published in 2017.

113 Clarendon Press, 2002.

114 Andrew Phang, "On Architecture and Justice in Twentieth Century Contract Law" (2003) 19 JCL 229.

115 Guenter Treitel, "Vicissitudes of an Academic Lawyer" (2018) 26 Zeitschrift für Europäisches Privatrecht 130, 173–174.

116 He cites as an example of the former the English High Court decision of *Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting (Bermuda) Ltd* [2011] Lloyd's Rep 195 and, in respect of the latter, the English Court of Appeal decision of *Edwinton Commercial Corporation v Tsavliris Russ (Worldwide Salvage and Towage) (The Sea Angel)* [2007] 2 All ER (Comm) 634, [102].

117 Andrew Phang, Goh Yihan and Jerrold Soh, "The Development of Singapore Law: A Bicentennial Retrospective" (2020) 32 SAcLJ 804, 876.

50 It might be apposite to conclude this part of the essay by quoting from one of the *Forewords* to a *Festschrift* honouring Professor Treitel on the occasion of his retirement; in this regard, Lord Browne-Wilkinson made the following (and very perceptive) observation:[118]

> [H]is work is marked by true intellectual honesty. He does not, like some of us, throw out suggestions which, even if stimulating, have not been thought through. Few contemporary lawyers have played as big a role in developing the law, primarily because his writings are the product of careful and principled thought founded on an exact and honest analysis of the existing case law.

IV. Professor Patrick Atiyah

A. The Person

51 As already mentioned, I never met Professor Atiyah in person although I did see and hear him speak in person (at a symposium to mark Lord Denning's one-hundredth birthday in 1999 at the University of Buckingham[119]). He seemed to me a passionate, animated and forceful speaker – perhaps it was the subject matter because, although he naturally paid tribute to Lord Denning in the paper he presented, he was also fairly critical of many of Lord Denning's judgments in the law of contract.[120] As it turns out, I was not far off the mark if the following observations by Professor James Goudkamp in his recent biographical memoir of Professor Atiyah are anything to go by:[121]

> As to his lecturing style, Atiyah was engaging and energetic and he not infrequently fulminated against

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118 F D Rose (Ed), *Consensus ad Idem – Essays on Contract in Honour of Guenter Treitel* (Sweet & Maxwell, London, 1996), p v.

119 Lord Denning was patron of the law school's journal, the *Denning Law Journal*.

120 P S Atiyah, "Lord Denning's Contributions to Contract Law" [1999] Denning LJ 1.

121 James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 162. Also, "Atiyah could sometimes be a rather difficult colleague and impatient with scholars who were less gifted than him, and he could let his temper get the better of him. In his writing, Atiyah tended to be fairly sparing in his praise of others …" (James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 173).

> judges and scholars with whose opinions he disagreed. This, coupled with frequent and pronounced gesticulations, made him a highly memorable speaker. Even when difficult to follow, Atiyah communicated his enthusiasm.

52 It also appears that the paper he presented on the occasion of Lord Denning's one-hundredth birthday was his final publication.[122]

53 The most comprehensive biographical account of Professor Atiyah to date is by Professor Goudkamp.[123] In the abstract to this excellent memoir, Professor Goudkamp summarises Professor Atiyah's life and work, as follows:[124]

> P. S. Atiyah was one of the great legal scholars of the twentieth century. The law of torts (especially in so far as that field concerns personal injury and death) and the law of contract were his principal interests, and he made immense contributions to those areas. His research also encompassed legal history and legal institutions. His most important works include *Accidents, Compensation and the Law*, the first edition of which was published in 1970, and *The Rise and Fall of Freedom of Contract*, which was published in 1979.

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[122] James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 171–172.

[123] James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149. Professor Goudkamp also draws extensively from Professor Atiyah's unpublished memoir entitled *An Academic Autobiography*. It was, in fact, Professor William Twining who was "instrumental in locating Atiyah's autobiography, which was long thought to have been lost, and facilitating [Professor Goudkamp] having access to it": James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 186. I understand from Professor Goudkamp that there are plans by Hart Publishing to publish this manuscript although there has been no further news to the best of my knowledge at the time of the writing of the present essay. Publication of the manuscript (which was located only after Professor Atiyah's passing) was made possible with the permission of his family: James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 169.

[124] James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 149.

54 Professor Atiyah was born on 5 March 1931 in England and was the second of four children.[125] His father, Edward Atiyah,[126] was of Lebanese origins and his mother, (Dorothy) Jean née Levens, was of Scottish descent; they met at the University of Oxford. The former was "a prolific author and political activist".[127] His elder brother, Sir Michael Atiyah, was "one of the world's most celebrated mathematicians".[128] Professor Atiyah was in fact "brought up in the Sudan where his father was employed as a schoolteacher and subsequently as a liaison between the Sudanese intelligentsia and the condominium administration".[129] The Atiyah family returned to Britain in 1945.

55 Professor Atiyah's own experience in a Magistrates' Court, where he defended himself on a charge of driving without due care and attention after having collided with a pedestrian while riding a motorcycle, apparently contributed to his decision to read law, as Professor Goudkamp recounts:[130]

> Atiyah defended himself and cross-examined the witnesses. He was convicted and fined a nominal sum but was asked by the magistrate, in view of the way in which he had conducted his defence, whether he was a law student. Atiyah reflected on these words and, by the end of the train journey home, he had essentially resolved to read law.[131]

56 He read law at Magdalen College at the University of Oxford under the same law tutors as Professor Treitel – Professor Rupert Cross and Professor John Morris. He "admired and liked" the former, and "may have admired but did not like" the latter (with "the antipathy

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[125] I am greatly indebted to Professor James Goudkamp's essay – from which I draw liberally: James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149.

[126] Who also published an autobiography: Edward Atiyah, *An Arab Tells His Story – A Study in Loyalties* (John Murray, 1946).

[127] James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 151.

[128] James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 175. He passed away not long after Professor Atiyah (on 11 January 2019).

[129] James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 151.

[130] James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 151.

[131] Instead of history or philosophy, politics and economics.

[appearing] to have been mutual").[132] Indeed, this last-mentioned fact resulted some years later in one of his applications for an appointment at an Oxford college being "torpedoed by a critical reference written by John Morris".[133] In fairness, though, another application to another Oxford college as well as an application to Cambridge for an assistant lectureship submitted at the same time were also unsuccessful.

57 Professor Atiyah graduated from Magdalen College in 1953 with first class honours in law and was "reportedly the best in the year".[134] He proceeded to read for his Bachelor of Civil Law, which he also obtained with first class honours in 1954. He then began his academic career as an assistant lecturer at the London School of Economics before being appointed as a lecturer and subsequently as a senior lecturer at the University of Khartoum where he worked between 1955 and 1959. It was at this juncture that he had applied unsuccessfully for the positions mentioned in the preceding paragraph, before proceeding to work at the Attorney-General's department at Accra in Ghana. He returned to England in 1961 and worked as a legal assistant at the Board of Trade. In 1964, Professor Atiyah received – "quite out of the blue"[135] – an invitation from New College, Oxford to accept a tutorial fellowship in law. He duly accepted the invitation and succeeded S F C Milsom (who was later to become a pre-eminent legal historian[136]). However, having found Oxford's tutorial system to be an "unbearable grind" and "[sensing] that there were few opportunities for promotion to a professorial fellowship", he decided to accept a chair in the then College of Law at the Australian National University.[137] He returned once again to England in 1973, taking up a chair at the University of Warwick. In 1974, the University of Oxford conferred on him the degree of Doctor of Civil Law in recognition of his published academic scholarship which, by that time, included a number of important books

[132] James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 151–152.
[133] James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 154.
[134] James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 152.
[135] James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 156.
[136] Perhaps his most famous work is S F C Milsom, *Historical Foundations of the Common Law* (2nd Ed, Butterworths, London, 1981).
[137] James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 157–158.

(which I will refer to briefly in the next section of this essay). Shortly thereafter, in 1977, he was elected Professor of English Law at the University of Oxford and was made a Professorial Fellow of St John's College (which was associated with the aforementioned chair). The reader will recall that Professor Treitel had applied (albeit unsuccessfully) for this very same chair.

58 Not surprisingly, and as Professor Goudkamp notes, Professor Atiyah's "international reputation grew, and invitations to deliver named lectures across the globe came thick and fast".[138]

59 Professor Atiyah retired from his chair at the University of Oxford in 1988. Unfortunately, this was an early retirement which was taken "on medical advice".[139] In that same year, he was elected to an Honorary Fellowship by St John's College and the University of Warwick awarded him with a doctorate; in the following year, he was appointed Queen's Counsel *honoris causa*.[140] A *Festschrift* was subsequently published in his honour.[141] Although he had largely retired from the law itself, he did publish four scholarly works during his retirement (with his final paper being delivered on the occasion of Lord Denning's one-hundredth birthday (to which I shall return briefly below)).[142] He passed away on 30 March 2018 at the age of 87 "[a]fter a cruel and lengthy battle with dementia that prevented him from engaging in the final years of his life with the academic world to which he had contributed so much".[143]

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[138] James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 164. These included the Lionel Cohen, Chorley and the Hamlyn Lectures, amongst others.

[139] "As well as his having been afflicted by chronic and sometimes severe depression intermittently throughout his career, Atiyah had long had trouble on account of congenital defects with his heart, having suffered from a cardiac arrest when he was around 40 years old and having undergone heart bypass surgery in 1987": James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 169.

[140] James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 169.

[141] Peter Cane and Jane Stapleton (Gen Eds), *Essays for Patrick Atiyah* (Clarendon Press, Oxford, 1991).

[142] James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 169–172.

[143] James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 172.

60 Let us turn now to a brief consideration of Professor Atiyah's scholarship.

B. The Scholarship

61 As already mentioned, Professor Atiyah is probably most well known – to students – for his book, *An Introduction to the Law of Contract*, the first edition of which was published in 1961.[144] As also alluded to above, the title was something of a misnomer as the book was not that rudimentary, although the book itself contained many thought-provoking ideas for students of contract law. On a related note, he published an earlier book (which was, in fact, his first book), *The Sale of Goods*.[145] A later book, entitled *Promises, Morals, and Law*,[146] is an engaging read (albeit of less practical use to lawyers as such). As Professor Goudkamp noted, "[t]he book was greeted by numerous reviews" and "[t]he originality of Atiyah's enterprise was readily acknowledged but the analysis garnered few supporters".[147]

62 At this juncture, it might be appropriate to note (albeit as a personal view only) that Professor Atiyah's focus was on more general themes and ideas. Not surprisingly, he engaged not only in contract law scholarship but also in the law of torts, and in more generally theoretical as well as historical and comparative work. One such example of his theoretical work is the volume entitled *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions*,[148] which he co-authored with Professor Robert S Summers.[149] I recall – as a relatively young lecturer then – being very impressed by this work, which I reviewed in a local law journal.[150] As

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144 Clarendon Press. This was part of the Clarendon Law Series and the book was written "at the invitation of Professor H. L. A. Hart acting on the suggestion of Atiyah's former tutor, Rupert Cross": James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 155.

145 Pitman, 1957.

146 Clarendon Press, 1982.

147 James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149,166.

148 Sub-titled "A Comparative Study in Legal Reasoning, Legal Theory, and Legal Institutions", and published by Clarendon Press, 1987.

149 Professor Atiyah presumably dealt primarily with English law and Professor Summers with American law.

150 Andrew Phang Boon Leong, Book Review of *Form and Substance in Anglo-American Law* (1988) 30 Mal LR 487.

Professor Goudkamp notes, "[t]he book was heralded by largely glowing reviews".[151] Indeed, it also inspired the theme for the biennial Obligations Conference in 2018 at Melbourne Law School.[152]

63 However (and again, this is a personal view only), the *tour de force* in Professor Atiyah's impressive list of scholarly publications is his magisterial work entitled *The Rise and Fall of Freedom of Contract*[153] (I note that even Professor Atiyah himself described this book as his "magnum opus"[154]). In the *Preface* to this work, he states that:[155]

> This is the first volume in a projected two-part study of the theory of contractual and promissory liability.[156] I hope to follow it with a volume devoted to the contemporary scene in which I will explore the interrelationship of modern contract law with the underlying theories and values of modern England. The book is primarily a study in the history of ideas although it also attempts to explore the interrelationship between social and economic conditions and those ideas.

64 Even a cursory glance at this almost 800-page treatise will demonstrate the vast inter-disciplinary knowledge of the author who straddles the law, economics, political theory, philosophy and history.[157] Whether or not one agrees with the arguments in this magnificent work is beside the point – few, if any, could have completed such a study to begin with (indeed, Professor Goudkamp notes that, upon its publication, "[a] deluge of overwhelmingly favourable reviews promptly ensued"[158]).

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151 James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 167.

152 James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 177.

153 Clarendon Press, 1979.

154 James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 162 (citing Professor Atiyah's (unpublished) *An Academic Autobiography*, Ch 12).

155 P S Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, 1979), p vii.

156 Covering the period between 1770 and 1970.

157 Professor Goudkamp refers to this book as a "sprawling intellectual history of the law of contract": James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 162.

158 James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 163. Indeed,

As its title suggests, this book makes the claim that classical contract theory had failed. In Professor Atiyah's view:[159]

> Much of this book is based on the conviction that [the] traditional attitude to promise-based obligations is misconceived, and that the grounds for the imposition of such liabilities are, by the standards of modern values, very weak when compared with the grounds for the creation of benefit-based and reliance-based obligations. The protection of mere expectations cannot (it is suggested) rank equally with the protection of restitution interests (arising from benefit-based liability).

65 It is very unfortunate that Professor Atiyah was not able to complete the second companion volume to which reference was made above. Professor Goudkamp provides some possible reasons as to why this companion volume did not ultimately materialise:[160]

> However, the other half of the grand project was never written, although extensive notes were prepared and still survive to the present day. This was perhaps because Atiyah's thesis that freedom of contract had been rejected was shown by various developments in the United Kingdom and elsewhere during the 1980s to be radically wrong. It may also have been the case that Atiyah simply no longer had the energy required for another vast undertaking.

66 It will be immediately apparent that, of all the giants of contract law considered in the present essay, Professor Atiyah had the most wide-ranging interests. As already alluded to above, he was also an expert in that other great branch of the law of obligations – the law of torts. As

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regardless of whether or not they agreed with the work, reviewers were in general agreement that this book was a hugely impressive work of intellectual history (see, for example, J H Baker, Book Review of *The Rise and Fall of Freedom of Contract* [1980] CLJ 467, 469; Charles Fried, Book Review of *The Rise and Fall of Freedom of Contract* (1980) 93 Harv L Rev 1858, 1860; and Charles M Gray, "The Ages of Classical Contract Law" (1980) 90 Yale LJ 216, 231).

159 P S Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, 1979), p 4.

160 James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 164.

mentioned above as well, his most famous work in that particular area of the law was *Accidents, Compensation and the Law*.[161] That, however, was not Professor Atiyah's first book in the area (which was, instead, *Vicarious Liability in the Law of Torts*).[162] And it was not his last.[163] Indeed, his work in the area merited an entire chapter devoted to him and his scholarship in the recent book, *Scholars of Tort Law*.[164] As noted above, much of his work was also theoretical as well as policy-oriented in nature. Indeed, Professor Goudkamp describes Professor Atiyah as "a legal polymath whose interests spanned tort law, contract law, legal history and legal institutions".[165] This *range* of legal scholarship was one of "the reasons for the longevity of his ideas".[166] In addition to this particular factor, Professor Goudkamp identifies five other factors which contributed to such longevity, and which he elaborates upon in his essay – these include integrity, originality, comparative scholarship, a broad perspective that transcended microscopic doctrinal analysis, as well as Professor Atiyah's highly distinctive prose.[167] Professor Goudkamp also notes that "[i]t is obvious that Atiyah must have been ferociously hard-working, it being quite impossible for his massive volume of writings to have been yielded without relentless industry".[168]

67 However, because Professor Atiyah's focus, unlike the other giants of contract law considered in the present essay, was not (in the main at least) on doctrine, his influence, whilst wide-ranging, was not as

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161 Weidenfeld and Nicolson, 1970. This book has also been described as "arguably his most significant book"; it has also been noted that this was the first book published in the famous *Law and Context* series and was "immediately greeted by considerable acclaim": James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 159, 160.

162 Butterworths, London, 1967. This was "his first major work concerned with tort law": James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 157.

163 P S Atiyah, *The Damages Lottery* (Hart Publishing, 1997). Indeed, his *first* published *article* was in relation to the tort of conversion: P S Atiyah, "A Re-examination of the *Jus Tertii* in Conversion" (1955) 18 MLR 97.

164 James Goudkamp, "Professor Patrick Atiyah (1931–2018)" in James Goudkamp and Donal Nolan (Eds), *Scholars of Tort Law* (Hart Publishing, 2019), Ch 11; indeed, this book is, in fact, also dedicated to the memory of Professor Atiyah.

165 James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 180–181.

166 James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 177.

167 James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 177–185.

168 James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 173.

significant in so far as citations by *the courts* were concerned. As Professor Goudkamp notes, although "Atiyah's research continues to be regularly cited in the courts, especially his *Vicarious Liability in the Law of Torts*, … his impact on judicial decisions appears to be rather muted".[169] As Professor Goudkamp proceeds to observe:[170]

> This is probably unsurprising given the radical nature of many of his claims, which rendered them unlikely to be endorsed by the courts. The real significance of Atiyah's work lies, therefore, mainly in its contribution to the intellectual history of the law …

68 Professor Goudkamp also observes thus:[171]

> His work was generally lightly referenced, which is consistent with Atiyah's interest usually lying not in the minutiae of cases and statutes but in wider concerns although it can also be attributed to the fact that nearly all of Atiyah's research was done in the pre-internet age and at a time when paid research assistance was essentially unknown. The sparse (and sometimes almost completely absent) footnoting had the advantage of preventing his readers (and perhaps Atiyah, too) from becoming bogged down in the details.

69 I would like to pause at this particular juncture to note, having had experience on both sides of the fence, so to speak, that there *is* a difference between academic scholarship on the one hand and the content of judgments on the other. In the Singapore Court of Appeal decision of *BOM v BOK*, [172] which concerned the doctrine of unconscionability, it was emphasised by the judge who wrote the judgment on behalf of the court[173] that nothing that he had written in an

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169 James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 177.

170 James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 177.

171 James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 183.

172 [2019] 1 SLR 349.

173 Which, in fact, happened to be myself.

extra-judicial capacity (in that instance as a legal academic) was influential by dint of its provenance alone, save to the extent that it contained persuasive arguments that might assist the court.[174] Indeed, the academic views concerned were, in fact, *rejected* in that case – in particular, the court opined that, without principled as well as practical legal criteria that would enable an *umbrella* doctrine of unconscionability to function coherently as well as practically, such a novel and radical shift towards an umbrella doctrine (whilst *theoretically* elegant) should not be undertaken. Further, the broad doctrine of unconscionability that constituted the basis for such an umbrella doctrine was not the law in Singapore and, in any event, might have been historically flawed.[175]

70 In summary, Professor Atiyah's contribution to the law in general and to the law of contract in particular should be viewed from a much *broader* perspective (when compared to the contributions of the other legal scholars considered in the present essay). His contributions were also much more varied and straddled areas that went *beyond* the law of contract. They are not only fascinating in their own right (integrating, as they do, theory with history and doctrine) but are also essential to understanding the broader legal landscape as well as developing the law in the future (particularly in controversial areas of the law).

71 It might be appropriate to conclude this part of the essay with the following observations by Professor Goudkamp:[176]

> … Atiyah was a serious individual who was deeply committed to his own research but at the same time was someone who engaged passionately with the ideas, both inside and outside the law, offered by those around him.
>
> …

[174] [2019] 1 SLR 349, [167].
[175] [2019] 1 SLR 349, [180].
[176] James Goudkamp, "Patrick Selim Atiyah, 5 March 1931 – 30 March 2018" (2020) 19 Biographical Memoirs of Fellows of the British Academy 149, 172, 185.

> Atiyah's work encapsulates the qualities to which all serious academic lawyers aspire. His writing was thought-provoking and displayed mastery of the materials on which his research was based, and compelled serious reflection about what, in particular, the law of tort and contract was ultimately about. He had no agenda other than a search for the truth. As Guido Calabresi (then the Dean of Yale Law School) wrote in the preface to the collection of essays written in Atiyah's honour, 'Patrick has been a model for us all of what a scholar should be. Always thorough, comprehensive and careful, he has, nonetheless, been willing to take on topics which were truly daunting and whose examination could never give rise to that "perfect treatment" in which lesser scholars take comfort.' In a similar vein, Tony Weir, who was himself a great scholar whose career substantially overlapped with Atiyah's, wrote in a review of the same collection that 'Atiyah is unrivalled in the number, scope and quality of his contributions to English scholarship in the last 40 years.'

V. Professor Brian Coote

A. The Person

72 Professor Coote is not only the doyen of New Zealand contract law but is also (as we shall see in a moment) a contract scholar of considerable influence across the Commonwealth. As already alluded to earlier, he is best known for his seminal work, *Exception Clauses*,[177] which was based on his prize-winning Cambridge doctoral thesis. Indeed, this was my first "encounter" with Professor Coote decades ago when I first read this ground-breaking work as a student; significantly, some decades later, I had the opportunity as a judge to refer to this particular work (which I shall elaborate upon a little later). I cannot pretend to know Professor Coote well, having met him in person just once, although I did correspond with him a few times subsequently. In so far as my personal meeting with Professor Coote was concerned, I

[177] Sweet & Maxwell, 1964.

can do no better than to reproduce – *in extenso* and in context – my closing remarks in a review essay of a collection of essays in his honour:[178]

> Legal scholarship may be 'excellent' because it expounds (from the perspective of *the present*) on an area of law with great insight inasmuch as the intellectual analysis is impeccable. It might also represent an impeccable example of synthesis as well (this is particularly the situation in so far as books and monographs are concerned). More importantly, perhaps, the piece of scholarship concerned might also contain important *normative* ideas that could help the law advance in *the future* as well. … However, it is precisely because of the very nature of the system of the common law itself that the vast majority of legal scholarship will (whilst being 'excellent' at the time that it was written and perhaps remaining so even a little into the future (particularly by way of furnishing a normative impetus to the development of the law in that particular field)) ultimately become obsolete. … Professor Coote's scholarship belongs to that tiny minority which continues to have meaningful impact even after the passage of many years (or even decades).
>
> …
>
> There is yet another meaning [of 'excellence' in legal scholarship] which is not quantifiable because it does not appear only in the printed word itself. Let me be direct. A legal scholar's legacy 'lives on', so to speak, not merely in the 'lifeless' pages of books and journals. An excellent legal scholar is also able to communicate the information in a given branch of law to others (in particular, students) as well. More importantly, in my view, he or she must also be able to communicate the

[178] Andrew Phang, "Contract as Assumption – The Scholarship and Influence of Professor Brian Coote" (2011) 27 JCL 247, 262, 263 and 264 (emphasis in the original text) (this was a review essay of Brian Coote, *Contract as Assumption – Essays on a Theme* (Rick Bigwood (Ed), Hart Publishing, 2010)).

methodology of (as well as the passion for study in) that branch of the law to others as well. Even more importantly (again, in my view), that is accomplished only when that legal scholar accomplishes all this with humility and humanity. I realize that this view may not be shared, but from my perspectives as a student, lecturer and judge, I have found the best legal scholars to be those whose exemplary character binds all the analysis and synthesis together. This *integration of person and scholarship* is what results, in my view, in a *lasting legacy*. More importantly, it is often a *living legacy* as well, for those whose lives have been touched by that legal scholar are inspired to touch the lives of others.

…

On a personal level, I met Professor Coote at a *Journal of Contract Law* Conference held in Auckland more than a decade ago. I was, by then, a fairly seasoned academic. But when I was told that Professor Coote would meet me at the airport, my first (and instinctive) reaction was to politely decline (out of a feeling of apprehension at meeting such an august scholar). I was glad that my offer was not accepted. One can hear many things and, as I have mentioned, I did indeed *hear* many things about Professor Coote. But there is no substitute for the *confirmation* of those things by one's own *experience.* I met – and later chatted – not only with a great Professor but also (and most importantly) with a man of great humility and humanity. I have met many professors during my decades in academia whose scholarship was 'excellent'. Professor Coote not only exemplified this first meaning of 'excellence' but also the second as well. As I have already mentioned, this second meaning of 'excellence', when combined and integrated with the first, yields *living and lasting results* because *people* are impacted in *a real and profound way*. That, in my view, is the enduring mark

> of a true scholar. And, if I may be permitted to say so, Professor Brian Coote is a rare – and shining – example of such a scholar.

73 These personal observations accord with what I have heard about Professor Coote – put simply, there was nothing but the highest praise whenever anyone spoke to me about him. Indeed, his former colleague, Professor Michael Taggart, observed as follows in his "Introductory Remarks" prior to Professor Coote's Valedictory Lecture:[179]

> Over the last third of a century, thousands of law students have passed through [Professor Coote's] classes and have benefited from his incisive legal analysis, his case-method style of teaching ***and his deep concern for their well-being. Brian Coote's dedication to his students and to this****, his,* ***Law School has been unstinting and total.*** It is no exaggeration to say that he has dedicated his life to the [Auckland] Law School.

74 It should also be noted that Professor Coote, not surprisingly, left a profound (and living) legacy in relation to the students he had taught. As Professor Peter Watts observed:[180]

> Amongst the former students of whom he felt particularly proud, and rated, is Sian Elias.[181] I gather the feeling was mutual. There is a host of other top practitioners and judges to whose careers he was proud to have had a connection. Many are here today. Others have sent their apologies, including David

[179] Entitled "Contract – An Underview" (Legal Research Foundation, Auckland, June 1995), 8 (emphasis in the original text; emphasis added in bold italics). This was in fact subtitled "A Souvenir of a Valedictory Lecture", which also included the aforementioned "Introductory Remarks" by Professor M B Taggart, "An Appreciation" by Tony Weir, a "Vote of Thanks" by D F Dugdale, as well as list of Professor Coote's publications (all ably compiled by B J Brown).

[180] Peter Watts, "Emeritus Professor Brian Coote, CBE, FRSNZ, Obituary" (2019) 36 JCL 1, 3.

[181] The immediate past Chief Justice of New Zealand.

> Baragwanath, [182] Ron Paterson [183] and Helen Winkelmann.[184]

75 However, it might be apposite, at this particular juncture, to emphasise that the qualities of humility and humanity are *not* coincident with weakness. As the old adage goes, kindness is sometimes taken for weakness. Those of us who have been teachers know that there is, on occasion at least, a fine line between being kind and encouraging to students on the one hand and "spoon-feeding" and generally indulging them on the other. It is only human for students to prefer the latter but law teachers do them a grave disservice when they pander to their students' personal and selfish desires instead of encouraging them to exercise their minds (which is an important and integral part of training students in the law and preparing them for practice and even life itself). Likewise, there is also a fine line in being generally kind as well as helpful to others on the one hand and being the proverbial "doormat" whom others simply exploit on the other. All this is easy to state but not really that easy to practise. Wisdom often comes through experience (including, unfortunately but perhaps necessarily, bad experiences as well). I have made these observations not only because I believe that, on appropriate occasions, a firm stand and hand are necessary (itself a life lesson) but also because, kind as he was, Professor Coote would not (correctly, in my view) suffer fools gladly. This point comes out most clearly in Professor Peter Watts's Obituary,[185] where it is observed (tongue in cheek) as follows:[186]

> Brian's rapier wit and style were a feature too of his conversation, and he kept this pretty well to the end. He was very much that type of cat which shows its affection by clawing one with a speed and devastation that one can only marvel at and laugh. He was good at starting with 10 per cent praise and then leaving a 90 per cent puncture wound. He knew no other way of engaging.

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[182] A former Justice of the New Zealand Court of Appeal.
[183] A leading Professor of Law at the University of Auckland.
[184] The present Chief Justice of New Zealand.
[185] Peter Watts, "Emeritus Professor Brian Coote, CBE, FRSNZ, Obituary" (2019) 36 JCL 1.
[186] Peter Watts, "Emeritus Professor Brian Coote, CBE, FRSNZ, Obituary" (2019) 36 JCL 1, 2–3.

76 I must have been fortunate not to have suffered any "puncture wounds"! Indeed, I still recall Professor Coote sending me a Christmas present – it was nicely gift-wrapped in Christmas wrapping paper and contained a copy of … his Valedictory Lecture![187] It might seem an odd present to many but to me (and he probably knew it), it was wholly appropriate and greatly appreciated!

77 Professor Coote was born on 26 November 1929 in Cambridge, New Zealand.[188] He read for his Bachelor of Laws at the (then) Auckland University College, graduating in 1953. He qualified as a Solicitor of the Supreme (now High) Court of New Zealand in 1952 and as a Barrister of that Court in 1953. Professor Coote then graduated with a Master of Laws from the same institution (with first class honours) in 1954. As noted earlier, he completed his PhD at Cambridge in 1959. He joined the Auckland Law Faculty in 1961 as a Senior Lecturer and was appointed to a Chair in Law in 1966, which he held for almost three decades (until his retirement at the end of January 1995). He was also Acting Dean of the Auckland Law Faculty for a number of years,[189] as well as Dean from 1984 to 1987. His contribution was *practical* in outlook too – he was a key member of the Contracts and Commercial Law Reform Committee for 20 years, and whose reports led to a distinctive and (in many ways) autochthonous *legislative* reform of New Zealand contract law.[190] Professor Coote was awarded a CBE in the 1995 New Year Honours list and was elected an inaugural Fellow of the New Zealand Academy of the Humanities in 2007. His retirement did not see any abatement in his academic output as he continued to research and write extensively on the law of contract until his passing at the age of 90 on 15 July 2019.

78 Professor Coote had interests outside the law, including membership of a hi-fi club as well as decoration of houses in

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187 Entitled "Contract – An Underview" (Legal Research Foundation, Auckland, June 1995).

188 In this section of the essay, I draw entirely from (and am grateful for) Professor Bigwood's *Preface* in Brian Coote (Brian Coote, *Contract as Assumption – Essays on a Theme* (Rick Bigwood (Ed), Hart Publishing, 2010)), pp v–vi.

189 1969, 1977 and 1983–1984.

190 Reference may be made to *Contract Statutes Review* (Law Commission, Report No 25, Wellington, New Zealand, May 1993).

Victorian/Edwardian style.[191] He also liked the outdoors and used to be a competitive swimmer as well.[192] He was exceedingly generous too, leaving the bulk of his estate for the creation of a Trust to benefit the Auckland Law School.[193]

79 Let us now turn to a brief consideration of Professor Coote's scholarship.

B. The Scholarship

80 Although, as already noted, Professor Coote wrote extensively on the law of contract, his principal influence in both theoretical as well as practical senses lie in the field of *exception clauses* – finding its roots in his doctoral thesis to which reference has already been made. However, this was not his only contribution. Professor Coote was also famous for the central concept which undergirds virtually all of his work (including that relating to exception clauses) – *contract as assumption*. Indeed, this was the title of the volume of his essays which Professor Rick Bigwood compiled in his honour.[194] This volume was subsequently followed by a second volume entitled *Contract as Assumption II – Formation, Performance and Enforcement*.[195] Indeed, there was a third volume of Professor Coote's essays that related to his writings on the New Zealand contract statutes in relation to mistake, privity of contract, contractual remedies and illegality.[196] Returning to the concept of "contract as assumption", we shall see that it has (particularly in recent years) also had a practical impact beyond the specific sphere of exception clauses. In so far as the concept itself is concerned, this was succinctly summarised by Professor Coote himself in the *Introduction* to *Contract as Assumption*, as follows:[197]

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[191] Peter Watts, "Emeritus Professor Brian Coote, CBE, FRSNZ, Obituary" (2019) 36 JCL 1, 3.

[192] Peter Watts, "Emeritus Professor Brian Coote, CBE, FRSNZ, Obituary" (2019) 36 JCL 1, 3.

[193] Peter Watts, "Emeritus Professor Brian Coote, CBE, FRSNZ, Obituary" (2019) 36 JCL 1, 3.

[194] Brian Coote, *Contract as Assumption – Essays on a Theme* (Rick Bigwood (Ed), Hart Publishing, Oxford and Portland, Oregon, 2010).

[195] Brian Coote, *Contract as Assumption – Formation, Performance and Enforcement*(J W Carter (Ed), Hart Publishing, 2016).

[196] Brian Coote, *Coote on the New Zealand Contract Statutes* (J W Carter and John Ren (Eds), Thomson Reuters, 2017).

[197] Brian Coote, *Contract as Assumption – Essays on a Theme* (Rick Bigwood (Ed), Hart Publishing, 2010), 1.

> [T]he pieces here collected concentrate on the role of assumptions of which contractual promises are the expression. All are to some extent based on the proposition that a contractual promise is an assumption of legal obligations and their attendant liabilities, which are binding, not because they have been imposed by law *ab extra* upon fulfilment of the requirements for formation, but because the promisors, using means provided by law for that purpose, have themselves assumed them.

81 He then observed thus:[198]

> Once accepted, this proposition, that contracting parties assume rather than merely incur contractual liabilities, and that contract is a facility supplied by law to enable them to do so, has a number of implications. One is that it becomes no longer necessary to search for justifications for the existence of contracts and contract law. It is … sufficient that the facility is provided for the classic purposes of peace, order and good government.

82 The concept of "contract as assumption" is undoubtedly theoretical in nature and, indeed, I have dealt with its theoretical applications elsewhere (and will therefore not rehearse them again in the present essay).[199] However, as I have also sought to point out, this concept has been invoked in *a practical context* as well.[200] This has likewise been dealt with in more detail elsewhere and I will therefore just refer briefly to a couple of examples.

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198 Brian Coote, *Contract as Assumption – Essays on a Theme* (Rick Bigwood (Ed), Hart Publishing, 2010), 1.

199 Andrew Phang, "Contract as Assumption – The Scholarship and Influence of Professor Brian Coote" (2011) 27 JCL 247, 249–253 (these include the doctrine of consideration, the "joint promisee" doctrine, the law of damages, the law of tort (specifically, in relation to the tort of negligent misstatement), and (not surprisingly) the sphere of exception clauses). In so far as theoretical perspectives are concerned, the reader may also wish to refer to another part of the article just cited, 259–261.

200 Andrew Phang, "Contract as Assumption – The Scholarship and Influence of Professor Brian Coote" (2011) 27 JCL 247, 253–259.

83 The first relates to Lord Hoffmann's introduction of an apparently new legal criterion to the then existing law relating to remoteness of damage in contract law in the House of Lords decision of *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)*.[201] The then existing law was, of course, premised on the famous statement of principle by Alderson B in the seminal English decision of *Hadley v Baxendale*.[202] However, in *The Achilleas*, Lord Hoffmann stated that the loss or damage in a contractual context would not be too remote if the defendant concerned had *assumed* responsibility for the loss that had occurred as a result of its breach. Whilst this particular approach has not been adopted in the Singapore context,[203] it is significant that the concept of "contract as assumption" finds tangible (if not wholly persuasive) expression in the highest appellate court in England. Indeed, as I observed in my review essay of *Contract as Assumption*,[204] "[l]ooked at in this light, the significance of [the book] is not only enhanced but the book itself may be viewed as being, in fact, ahead of its time".[205] It is pertinent to add that it came as no surprise when Professor Coote himself wrote approvingly on *The Achilleas* in a note on the case.[206]

84 A second example is – not surprisingly – in the context of exception clauses. I have dealt in particular with the impact of Professor Coote's legal scholarship in this area of the law elsewhere[207] – especially in relation to two Singapore judgments[208] – and the reader is referred to that detailed discussion.

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201 [2009] 1 AC 61 (more popularly known as well as referred to as "*The Achilleas*").

202 (1854) 9 Exch 341.

203 See the Court of Appeal decisions in *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150 and *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] 2 SLR 363.

204 Brian Coote, *Contract as Assumption – Essays on a Theme* (Rick Bigwood (Ed), Hart Publishing, 2010).

205 Andrew Phang, "Contract as Assumption – The Scholarship and Influence of Professor Brian Coote" (2011) 27 JCL 247, 254.

206 Brian Coote, "Contract as Assumption and Remoteness of Damage" (2010) 26 JCL 211. It should also be noted that Professor Coote does also refer briefly to *The Achilleas* in Brian Coote, *Contract as Assumption – Essays on a Theme* (Rick Bigwood (Ed), Hart Publishing, 2010), 159–161.

207 Andrew Phang, "Contract as Assumption – The Scholarship and Influence of Professor Brian Coote" (2011) 27 JCL 247, 255–258.

208 The High Court decision of *Emjay Enterprises Pte Ltd v Skylift Consolidator (Pte) Ltd* [2006] 2 SLR(R) 268 and the Court of Appeal decision of *Sun Technosystems Pte Ltd v Federal Express Services (M) Sdn Bhd* [2007] 1 SLR(R) 411.

85 The more general demonstration of the *practical* impact of Professor Coote's legal scholarship lies in its widespread citation by the courts in many jurisdictions. His work has been cited by the courts of no fewer than seven jurisdictions (*viz*, England, Canada, Australia, New Zealand, Hong Kong, Singapore and even the Turks and Caicos Islands (in this last instance, *via* the Judicial Committee of the Privy Council)).[209] The citation of his work in legal books and periodicals would, needless to say, be even more widespread.

VI. Concluding Thoughts

86 The present essay had two main aims. The first was to give a brief account of the lives as well as scholarship of four giants of contract law. Indeed, it may be said that their scholarship has contributed to the foundational bedrock of the law of contract as we know it today. This has enabled scholars, practitioners and judges to build and refine the law further not only in England but also throughout the Commonwealth. A great debt of gratitude is owed to them.

87 We have also seen that their contributions to the law of contract differed. Professor Furmston, Professor Treitel and Professor Coote contributed more towards the *practical* sphere – as already noted above, many of their works have been cited by courts throughout the Commonwealth. This was also the case with Professor Atiyah's work although this was less stark. Yet, his relatively less pronounced impact on judicial decisions is unsurprising in view of the fact that his work contributed more towards the intellectual history of the law[210] – a more normative enterprise. As a former legal academic and now judge, I can appreciate these contributions in their rich fullness.

88 A second aim of this essay was to draw out some life lessons. These included, first, the need to have hobbies and personal interests outside the law. A second lesson is the need to resist the temptation to put off giving thanks to those who have touched our lives in one way or another – in particular, as in the law of contract generally, an objective test is applied to ascertain whether gratitude has been shown and, in this regard, one should be quick to demonstrate this tangibly rather than

[209] Andrew Phang, "Contract as Assumption – The Scholarship and Influence of Professor Brian Coote" (2011) 27 JCL 247, 258–259.

[210] See above, note 169.

hiding it under a bushel. Thirdly, there is no substitute for perseverance and sheer hard work – this is evident from the lives and careers of all the scholars considered in the present essay, for none of them achieved success the easy way. A fourth lesson is that life, whilst unpredictable, is (paradoxically) not random – we are where we are for a purpose and it is our duty to fulfil that purpose (whatever it may be) to the best of our ability. The final – and most important – lesson is that we need to possess *humanity and humility*. Indeed, these have been the hallmarks of all *truly* great persons. Put simply, *people* matter more than wealth or status and it is only by possessing (and demonstrating) the qualities of humanity and humility that we can touch other lives for the better – thus establishing a "living legacy" beyond our own physical lives.

The author with Professor Michael Furmston **[July 2004]**