Book Review
Compte rendu

The Law of Rescission

by Dominic O'Sullivan, Steven Elliott and Rafal Zakrzewski
Oxford: University of Toronto Press

Reviewed by Neil Guthrie*

No book has been devoted to the rescission of contracts since 1916 and none from England until now. The topic is given a few pages in the standard contracts texts, but nothing like the comprehensive treatment afforded by O'Sullivan, Elliott and Zakrzewksi in *The Law of Rescission*.[1] Part of the difficulty has been conceptual ambiguity. As Stephen Waddams notes, the term "rescission" can mean a number of things. It can be what the innocent party seeks in the face of repudiation or repudiatory breach; the effect of fundamental breach; or a measure of damages for repudiation that reflects out-of-pocket loss rather than expected performance.[2] It is also the relief that may be available where mistake or misrepresentation underlie the formation of the contract.[3] *The Law of Rescission* concerns itself with 'rescission' only in relation to contracts that are void *ab initio* – that is, based a defect in the formation of the contract, whether this is through fraud, duress, undue influence or some other invalidating cause. Rescission for a later, frustrating cause, such as non-performance or defective performance, is not covered.

Even so, the authors have their work cut out for them, given the hybrid and often confusing nature of rescission. It has roots in both the common law and equity; the available remedies are both personal and proprietary; and the case law has been plagued by conflicting lines of authority. O'Sullivan and his co-authors recognise that they cannot hope to resolve all of the issues, but in their stated objective of ordering the subject they have certainly succeeded. The book provides a clear exposition of the grounds for rescission *ab initio* (misrepresentation; non-disclosure; duress and undue influence; mistake, impaired capacity and unconscionable bargains; conflict of interest; third-party wrongdoing),

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[1] Dominic O' Sullivan, Steven Elliott and Rafal Zakrzewski, *The Law of Rescission* (Oxford: Oxford University Press, 2002) [*Rescission*].

[2] *The Law of Contracts*, 5th ed. (Aurora, Ont.: Canada Law Book, 2005) at paras. 627-30.

[3] *Ibid*. at paras. 350f, 418-26.

the thorny area of rescission by election, the remedy of *restitutio in integrum*, bars to rescission (intervention of third parties, affirmation, delay and estoppel, bankruptcy and winding-up, contracting out, non-fraudulent misrepresentation) and finally the application of rescission to gifts and deeds.

Although the focus of the book is on English law, there is much of interest to the Canadian lawyer – the Canadian litigator in particular. One interesting possibility is that of rescission on terms, whereby a contract is rescinded by court order on the condition that the claimant seeking relief must comply with such terms as are necessary to achieve *restitutio in integrum*. This clearly offers scope for creative remedies in the face of a rescinded contract. Rescission on terms is a matter of "settled principle" in England, now that the "parallel" line of authority resulting from Lord Denning's decision in *Solle v. Butcher*[4] has been overruled in *Great Peace Shipping Ltd v. Tsavliris Salvage (International) Ltd ("The Great Peace")*[5] – and notwithstanding certain "heretical" decisions in England, Australia and New Zealand.[6] Rescission on terms appears not to have been considered squarely in Canada at all, however. There is an opportunity, surely, to apply the English principles on the right facts in Canada. A similar opportunity exists with respect to the decision in *Great Peace* itself, which has clarified and narrowed the scope, in English law at least, for avoiding contracts on the grounds of mutual mistake (if, as John Swan has suggested, not entirely satisfactorily).[7]

The Law of Rescission also offers guidance to Canadian lawyers on the 'enormously confused' topic of transactions voidable only in equity, where the vexed question has been whether the innocent party may rescind by election or is required to obtain a court order in order to do so. The authors conclude, on the balance of the authorities, that election is effective in equity only where the contract was procured by fraud.[8] Although it might at first seem odd that law and equity remain resolutely unfused in this area more than a century after the *Judicature Acts* of 1873 and 1875,[9] the authors argue persuasively[10] that the ability of an injured party simply to elect to rescind should be limited, given the drastic nature of such self-help, to a relatively narrow range of circumstances including

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[4] [1950] 1 K.B. 671 (C.A.).

[5] [2003] Q.B. 679 (C.A.)[*Great Peace*].

[6] O' Sullivan, Elliott and Zakrzewski, *supra* note 1 at para. 13.13.

[7] *Canadian Contract Law* (Markham, Ont.: LexisNexis Butterworths, 2006), at 583-5.

[8] O'Sullivan, Elliott and Zakrzewski, *supra* note 1 at para. 11.55.

[9] *Supreme Court of Judicature Act* (U.K.), 36 & 37 Vict. c. 66; *Supreme Court of Judicature Act 1875* (U.K.), 38 & 39 Vict. c. 77.

[10] O'Sullivan, Elliott and Zakrzewski, *supra* note 1 at para. 10.03f.

executory contracts induced by fraud or duress; executed contracts for the sale of goods or payments of money induced by fraud; and contracts of insurance affected by the fraud or misrepresentation of the insured. Equitable rescission, which is available on much wider grounds and with respect to all types of transactions, ought therefore to be subject to the requirement to obtain a court order, except in cases involving fraud.[11] The question has, however, "not … been much discussed by Canadian courts," although the Canadian position appears to be consistent with the view taken by the authors.[12] This, too, is a topic which invites further elaboration in our jurisprudence.

The authors cover some peculiarly Canadian aspects of their subject as well, notably the doctrine of *error in substantialibus*, which we borrow from Scots law and which (despite the criticisms of Professor Fridman) is a well-established principle in the Canadian law of contracts, conveyances of real property in particular. Under this doctrine, error with respect to a "substantial matter" will render the contract voidable, although there is considerable uncertainty as to how significant the discrepancy must be between what was promised the party seeking relief and what was actually delivered. The authors conclude that even with this uncertainty the doctrine may be justified, in light of the bar to rescission in Canada for non-fraudulent misrepresentation once a sale of land has closed.

The book does not claim to deal comprehensively with rescission in Commonwealth jurisdictions other than England, but there is a useful overview of developments in Canada, Australia and New Zealand, especially on aspects of the subject where divergences in approach have emerged – for example, the status of bars to rescission (in part as a result of the mitigating doctrine of *error in substantialibus*[13] and Canada's more expansive doctrine of unconscionability.[14]

In its careful review of the law of rescission, this text provides a useful addition to the lawyer's toolkit – and there is much that a Canadian practitioner will find both helpful and informative.

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[11] *Ibid*. at para. 11.55.

[12] *Ibid*. at para. 11.99.

[13] *Ibid*. at paras. 27.14-15, 27.30-31 and 27.41.

[14] *Ibid*. at para. 7.10