Book Review

Charles Béar KC, a barrister at **Fountain Court Chambers**, reviews a recent publication

Title: The Law of Rescission 3rd Edition
Authors: Dominic O'Sullivan KC, Steven Elliott KC, Rafal Zakrzewski
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The title of this increasingly valuable work, now in its third edition, conceals more than it reveals. As every law student learns, since 1979 "rescission" has not meant what happens when one contracting party terminates for the other's breach.[1] Although it would have that status in the United States, English law instead enforces the unfulfilled duties of the party in breach by computing their financial value and awarding damages. But in the words of Toulson LJ:

> "The cardinal principle of [contractual] autonomy also has another side. In circumstances where one party has taken improper advantage of the other, so that the agreement cannot fairly be regarded as an exercise of free will, rules have been developed to protect the vulnerable party. The rules relating to misrepresentation, duress and undue influence share in this respect a common objective."[2]

So, at the highest level, rescission is one of the law's "first responders" in situations of impaired consent. That does not quite mean (to paraphrase Lord Toulson in less elevated terms) that this book could have been subtitled *Where to go when your client has made a bad bargain*. Where a commercial deal has gone badly wrong, the practitioner is often confronted with a confusing welter of options. Likewise, in framing their work, Dominic O'Sullivan, Steven Elliott and Rafal Zakrzewski have had to steer a difficult line between an overly focused monograph and what could easily have become a sprawling competitor to a number of the main practitioner textbooks. In this reviewer's opinion, they have largely succeeded.

A strength of the work is the connections it brings out between the grounds for retrospective withdrawal from a transaction; the mechanisms which the court will deploy to bring about the withdrawal and give it practical effect; and the limits on when a transaction can be undone. The comprehensive yet concise treatment of areas such as misrepresentation (chapter 4), and exclusion clauses (chapter 26) is a welcome addition even though these are well-trodden fields. Breach of fiduciary duty, however, finds itself bifurcated between chapter 5 ("Non-disclosure"), where it is bracketed together with topics as disparate as insurance and unilateral mistake, and what might have been seen as a more natural home in chapter 8 ("Conflict of interest"). Surely the vice of a fiduciary's non-disclosure is precisely its failure to allow informed consent to cure the conflict?

The authors also strike out into some of the key areas which the practitioner will consider alongside rescission. Chapter 2 surveys concurrent money claims which are carefully distinguished from rescission itself. Chapter 16 examines proprietary claims to recover benefits transferred or obtained. A key attraction of rescission is as a gateway to tracing the proceeds of the wrongdoing. Often the remedies against the contracting party are less important than those against third parties.

Ironically, one of the more challenging areas is posed not by contextual materials but by an unresolved issue at the heart of the modern law. Common law rescission involves a revesting of title brought about by the party defrauded, which must communicate its disavowal of the transaction. But the common law remedies are rarely available, given the strict insistence on literal restoration of the status quo. The more flexible and potent equitable remedy is often thought, from the very fact of its discretionary nature, to require a court order as a necessary precondition to any operative effects. As the New York Court of Appeals said 150 years ago, aptly cited by the authors, "the difference between an action to rescind a contract and one brought, not to rescind it, but based on the theory that it has already been rescinded, is as broad as a gulf".[3] But if this line of thinking is taken to a logical conclusion, no effects could occur at all until the court had finally pronounced. In the meantime, however, matters may risk developing on the ground, eg a transfer of affected property to third parties. From a pragmatic point of view, the court must have power to grant injunctions to a would-be rescinder. The difficulty comes in identifying a juristic basis. It may be this tension, as much as the historical confusion which the authors deftly skewer, that has impelled English judgments towards the election theory and thus produced a situation in which the authorities, as the Court of Appeal recently confessed, are "in a state of disarray" that only the Supreme Court can resolve.[4]

The authors propose a hybrid solution under which, in cases of "fraud" only, the injured party's election would constitute some form of equitable rescission "in a weak sense" pending the court's order. That proposition is explored over a series of interlocking references: the reader is sent from chapter 11 to chapter 15 and then chapter 16 to learn of its ramifications. Whether the solution will appeal when the issue finally does get to the Supreme Court remains to be seen. What is eminently predictable, however, is that this work will be sitting on counsel's bench as the argument takes place. ■

1 *Johnson v Agnew* [1980] AC 367.
2 *Samuel v Wadlow* [2007] EWCA Civ 155.
3 *Gould v Cayuga County National Bank* 86 NY 75.
4 *IGE v Commissioner for Her Majesty's Revenue and Customs* [2021] Ch 423.