

PROFESSOR SIR GUENTER TREITEL (1928 – 2019) **Lord Burrows, Justice of the Supreme Court of the** **United Kingdom**

Talk at a workshop on *Scholars of Contract Law*, 7 **May 2021**

This is an extended version of a talk delivered at a workshop on *Scholars of Contract Law* held remotely on 7 May 2021 and convened by Professor James Goudkamp and Professor Donal Nolan. The paper will be published in 2022 in *Scholars of Contract Law* (eds Goudkamp and Nolan, Hart Publishing). The other contract scholars covered in the volume will include Gilbert, Colebrooke, Leake, Anson, Pollock, Williston, Corbin, Kessler, Macneil, Coote, and Cheshire and Fifoot.

1. Introduction

Sir Guenter Treitel died at the age of 90 on 14 June 2019. As a law student at Oxford in the 1970s, I used his textbook on *The Law of Contract* (then in its fourth edition) and I attended his contract lectures (including no fewer than 16 lectures on the doctrine of frustration!). During my five years as a Law Commissioner in the 1990s, he was a great help to me on the project that led to the Contracts (Rights of Third Parties) Act 1999. I still have the beautifully hand-written letters, running to many pages and containing scores of specific points (there were 83 in one letter), in which, at my request, he commented on the Law Commission's draft report and the draft bill. During the last decade of his life, I saw and chatted with him on a regular basis – usually at lunch once a week – at All Souls College. He was by then an Emeritus Fellow having previously been the Vinerian Professor of English Law and a Professorial Fellow at the college. I gave one of the tributes at his memorial service in which I described him as '*the world authority on the English law of contract in all its glory*'.

It follows from my close association with Guenter that it is not entirely straightforward for me to offer an objective analysis of his work as a scholar of contract law. Nevertheless, in what follows I have tried to put our friendship largely to one side and to review his contribution as dispassionately as possible.

2. His early years

Although one can isolate Guenter's work from his early life, it is appropriate to offer a brief description of those extraordinary years, as a Jewish boy growing up in, and

fleeing in the nick of time from, Nazi Germany. This is not least because, inevitably, they deeply affected and shaped everything Guenter later did in his life. He told the story in a gripping lecture to the Oxford Chabab Society in September 2012¹ and it is set out in more detail in an article published posthumously entitled 'A German Childhood 1933-1942: Persecution and Escape'.²

Guenter's first personal experience of anti-Semitism came in 1935, when the Nuremberg laws were passed formally reducing Jews to second-class citizenship. At the age of 7, he was expelled from state school simply because he was Jewish. Suddenly, his previous non-Jewish friends spurned him and, on one occasion, beat him up on the stairs of his apartment building where they also lived. Later on, at parks and other places, not least the playground at the back of the Berlin zoo which had been a refuge for Jewish friends to play in, away from verbal and physical persecution on the streets, signs appeared saying 'Jews not welcome'. Matters became worse in 1938. His uncle, who had fought for the Germans in World War I and was decorated with the Iron Cross, was taken away for a period in a concentration camp and emerged emaciated and with what Guenter described as a 'hunted look' in his eyes.³

This led the Treitel family to try to leave Germany. Another uncle had married and was living in England and, shortly after the horrors of *Kristallnacht*, this meant that, with a great deal of difficulty, Guenter and his brother were found places on the famous *Kindertransport* out of Germany in March 1939 heading for a sponsor in England. On the train out of Berlin, Guenter was interrogated to make sure he was not carrying more than one mark or any gold. Guenter remembered being worried that he would be hauled off the train when he realised that he had not disclosed that his fountain pen had a gold nib. On arrival at the port at Hamburg, he described the relief at embarking on the ship to leave Germany. 'The relief that I felt when walking up the gangplank is indescribable; I had felt nothing like it before nor have I experienced anything similar since.'⁴ On arrival at Southampton, having left wintry cold Berlin, he could not fail to appreciate the symbolism because 'the air was mild, it was obviously Spring, the sun was shining and the daffodils were out'.⁵

Guenter was of the view that, had he stayed in Germany, and had he been lucky enough to survive, he would have followed his father into the legal profession and would have had a far less satisfying life than he had enjoyed as an academic lawyer

in England. In a moving finale to his lecture to the Chabab Society, he asked which words from Shakespeare might be said to sum up his life given those dark early years. His answer was six words from 'As You Like It' (Act 2 Scene 1): 'Sweet are the uses of adversity'.

3. Four categories of publications

In considering the range of Treitel's scholarship, it is helpful at the outset to divide his publications into four categories. Of these, it is clear that, as with most of the tort scholars considered in *Scholars of Tort Law*,⁶ his greatest influence has been through the many editions of his textbook.

So the first category simply and solely comprises Treitel's textbook, *The Law of Contract*. The first edition was published in 1962 and, under Treitel's authorship, it ran to eleven editions (the 11th edition being published in 2003). It then became *Treitel on Contract* by Professor Edwin Peel for the 12th edition in 2007 and is now, under Peel's continued authorship, in its 15th edition (published in 2020). This textbook is Treitel's most famous and important work and epitomises his style of scholarship. It will therefore be the main focus of this chapter.

However, it is worth noting that, alongside that major textbook, Treitel also produced a shorter textbook – conceived as making the law of contract accessible to non-law students, for example those studying business degrees – entitled *An Outline of the Law of Contract*. The first edition of this shorter book was published in 1975 and ran to six editions, the last being in 2004. Close examination shows that this book represents, in effect, a concise summary of *The Law of Contract* with the same basic rules and exceptions highlighted but with many of the details omitted. It is a remarkably clear and succinct account of the law of contract – and occasionally the relative lack of detail means that the exposition is clearer than in the main work – but, in terms of assessing the features of Treitel's scholarship, it adds very little, if anything, to what we can glean from the main book.

The second category of publications contains Treitel's contributions to two major practitioner works, both in the *Common Law Library Series: Chitty on Contracts* and *Benjamin's Sale of Goods*. These are included as a separate category because Treitel's labours on these books continued, off and on, for almost all his academic life and he was deeply committed to them. He was an editor for 50 years of the former

(between 1968 and 2018) and an editor of the latter for 40 years. Also worthy of mention in this category, as it is probably more accurately viewed as being a work for practitioners rather than being an academic monograph, is *Carver on Bills of Lading* (1st edition in 2001 and running to a 3rd edition in 2011). Co-authored with Professor Francis Reynolds, this comprises a completely rewritten version of the original work by Carver. Also falling within this category was Treitel's very first foray into book authorship which took the form of writing afresh four chapters (none of which was directly focussed on contract law) in the 7th edition (published in 1961) of *Dicey on the Conflict of Laws*. As *Dicey, Morris and Collins on the Conflict of Laws* (now in its 15th edition, 2018), this remains the leading practitioner work on English private international law (although Treitel's subsequent decision to focus on contract law meant that his contribution to this book was limited to that one edition). Treitel also wrote the general chapter on contract in *English Private Law* (1st edition, edited by Peter Birks, in 1998).⁷

A third category comprises Treitel's academic monographs. There were three of these. The first was *Remedies for Breach of Contract: A Comparative Account* (1988) which built upon his much earlier contribution to the *International Encyclopaedia of Comparative Law* (1976, edited by Arthur Von Mehren) and examined remedies for breach across Anglo-American, French and German law. The second was *Frustration and Force Majeure* (1994) which ranged across Anglo-American law and was the culmination of Treitel's deep fascination (as I recall from his student lectures) with that area of contract law and with the history behind some of the cases, such as the burning down of the Sussex Music Hall in 1861 resulting in the leading case of *Taylor v Caldwell*.⁸ Finally, there was his 2002 book, containing the three Clarendon Lectures he gave in Oxford in 2001–2002, *Some Landmarks of Twentieth Century Contract Law*. He here examined, in depth, agreements to vary contracts, the battle over privity, and types of contractual term.

The final category of Treitel's publications contains his articles, essays and case-notes. There was a steady flow of these throughout his career. In my view, the five most important are as follows:

(i) 'Specific Performance in the Sale of Goods' [1966] *Journal of Business Law* 211

This article is particularly important for recognising what Treitel labelled 'commercial uniqueness'. In deciding whether specific performance should be ordered of a contract for the sale of goods, Treitel argued that the courts have accepted that, in addition to physically unique goods, which cannot be replaced by using an award of damages to purchase substitute goods, there are commercially unique goods. These are goods which cannot easily be replaced in the market, for example, petrol at a time of an acute shortage of petrol or heavy machinery which will take many months to re-manufacture. As damages are inadequate, specific performance of the obligation to deliver such commercially unique goods is therefore appropriate.

(ii) 'Consideration: A Critical Analysis of Professor Atiyah's Fundamental Restatement' (1976) 50 *Australian Law Journal* 439.

This was a long article written in direct response to an attack on the conventional understanding of the doctrine of consideration by Patrick Atiyah, *Consideration in Contracts: A Fundamental Restatement* (1971).⁹ Atiyah and Treitel were, for several years, academic rivals in Oxford. Their style and approach to scholarship could not have been more different. Treitel was concerned with the accurate detail of the law and had no real interest in sweeping broad theories. Atiyah, in contrast, saw the law as reflecting important overall policies and intellectual or social trends. In this essay, Treitel rejected Atiyah's heretical central argument that consideration means nothing more than a good reason for enforcing a promise. Rather he argued that the conventional understanding of consideration as a requested benefit or detriment is accurate albeit with some exceptions and with reliance on 'invented consideration'. For Treitel this reflected accurately the law as understood and applied by the judges. To argue, as Atiyah had done, that the better interpretation was that that was all a myth was anathema to Treitel.

(iii) 'Doctrine and Discretion in the Law of Contract' (his inaugural lecture as Vinerian Professor in 1980, published by Oxford, Clarendon Press, 1981)

Given Treitel's love of detailed clarity in the law of contract, it is not surprising that he was against the trend in some legislation affecting contracts – in particular the Unfair Contract Terms Act 1977 – to confer wide-ranging discretions on judges, for example to determine whether an exclusion clause was a fair and reasonable one to have been included. Wherever possible, he thought that rules were preferable to discretions albeit

that he allowed for considerable flexibility by recognising numerous exceptions to the rules.

(iv) 'Fault in the Common Law of Contract' in M Bos and I Brownlie (eds), *Liber Amicorum for the Rt Hon Lord Wilberforce* (Oxford, Clarendon Press, 1987) ch 11.

One of the most overlooked areas of English contract law is the standard of liability. While there is a tendency to assume that the contractual standard is one of strict liability, in many areas (for example, the contractual duties owed by a professional to its client) that is inaccurate and the correct standard is one of reasonable care albeit that this is all subject to whatever precise terms are agreed by the parties. In this illuminating essay, Treitel looks in detail at this question that has both practical and theoretical importance.

(v) 'Damages for Breach of a CIF Contract' [1988] *Lloyd's Maritime and Commercial Law Quarterly* 457

In many respects, this is my favourite of Treitel's articles. It deals with the fiendishly difficult and technical question of when 'market loss damages' are available for the breach of a cif contract. Treitel argued that, as the authorities were slowly but surely showing, and as logic dictated, such damages are available only where there is a 'double breach'. That is, where neither the documents nor the goods are in conformity with the contract. The article shows off all Treitel's best qualities of clear and rigorous analysis of the cases however detailed and difficult the subject matter may be.

4. Some general points about Treitel's published work

In looking across those four categories, three general points about Treitel's body of published work should be stressed.

First, his work was almost entirely concerned with the law of contract. With the exceptions of his earliest writings (eg on the conflict of laws) and a light-hearted excursus in the 1984 LQR into law and literature (through his examination of the legal problems in the works of his beloved Jane Austen)¹⁰ he was really only concerned to write about the law of contract (including relevant restitutionary remedies). In addition to his unrivalled knowledge and understanding of the general principles of contract law, he had a specialist expertise in relation to international contracts for the sale of goods (eg cif and fob contracts). In this respect, his four chapters in *Benjamin's Sale*

of Goods and his chapters in *Carver on Bills of Lading* comprise some of his most original and brilliant work albeit that their drilling down into the very fine details of the case law and statutes may not be to everyone's taste. They were once described to me by one expert and former colleague of Treitel as engaged in looking at how many angels there are on a pinhead.

Secondly, despite being German (he retained a slight Germanic accent throughout his life), Treitel was largely concerned with writing on the English law of contract. While well capable of producing important comparative work, as shown by his comparative law book on remedies for breach of contract, he was primarily fascinated by the English law of contract, especially the case law. Perhaps surprisingly, he showed relatively little interest in the general law of contract in civil law jurisdictions, including Germany.

Thirdly, using the helpful classification of tort scholars put forward by Goudkamp and Nolan in *Scholars of Tort Law*, Treitel was indisputably a 'consolidator'.¹¹ His scholarship falls squarely within what one may describe as 'black letter law' or 'practical legal scholarship' (also often referred to as 'doctrinal legal scholarship').¹² It examines in great depth and detail what the judges have laid down in past cases and what precisely are the effect of statutes. His work engages hardly at all with other academic writing. And, in particular, he showed no interest in grand overarching theories, such as moral rights reasoning or economic analysis. Working out, and explaining as clearly and succinctly as possible, the sophisticated patterns of the common law were what inspired him. Perhaps not surprisingly therefore even his writing aimed at students appealed to practitioners and judges. Indeed, as successive editions of his textbook on Contract became longer and more detailed, it may be that judges and practitioners became his primary readership and admired his work the most.

5. Treitel's principal work: *The Law of Contract*

As I have indicated, it is indisputable that Treitel's most famous work and the one for which he will most be remembered is his textbook, *The Law of Contract*. This section focuses on a number of aspects of that work. We begin by examining the ways in which his textbook was different to others. We shall then move on to draw out in some detail the particular type of practical legal scholarship that the book epitomises.

(1) How did Treitel's textbook differ from others?

By the time in the late 1950s when Treitel was considering writing his textbook, there were two other main student textbooks on the English law of contract: *Anson's Law of Contract* and *Cheshire and Fifoot's Law of Contract*. The first edition of the former by William Anson had been published in 1879. The first eleven editions (the 11th edition being published in 1906) were written by Anson himself but thereafter other authors took over. The 21st edition published in 1959 was written by JL Brierly. *Cheshire and Fifoot* had first appeared in 1945 and there were fourth and fifth editions, by the original authors, in 1956 and 1960. By this stage, *Pollock's Principles of Contract* was fading away with the last ever edition (the 12th edition in 1946) being edited by Winfield (who, it is of interest to note, used brackets to indicate his amendments from Pollock's text). Like today, *Chitty on Contracts*, albeit superbly edited by a new team put together by the general editor John Morris in 1961 (including, for example, Tom later Lord Bingham), was aimed at practitioners and not students.

It would seem clear, therefore, that in the late 1950s Treitel looked at *Anson* and *Cheshire and Fifoot* and decided that there was room for another student text. The preface to the first edition of his book published in 1962 indicates that he thought the existing texts were somewhat old-fashioned and had an excessive focus on contracts for the sale of goods rather than the full range of commercial life. He also recognised that his book included more detail – and in that sense he was hinting at a higher level of sophistication – than the other student texts.

He explained his motivation in the following way:

[M]y choice of subject was to a large extent governed by the fact that I was not entirely satisfied with the treatment of it, admirable though it was, in other books on English contract law. Their emphasis on one particular contract (ie sale of goods) seemed to me to be hard to justify when much of the development of the subject had taken place in cases concerned with other aspects of commercial practice. The analysis in the existing books of developments in the courts also seemed to me to do less than justice to the sophistication with which the judiciary had handled these developments. In retrospect, I would say that I hoped to raise the level of academic discourse in the subject. I did not put it to myself in quite this way; but (consciously or not) that was what I tried to do in

the 40 years and 11 editions of the book that followed its original publication in 1962.¹³

Although Treitel's view that the other books tended to focus too much on contracts for the sale of goods is puzzling (because that does not appear to be a particular feature of those books), it is clear that he was concerned to examine the judges' reasoning in more depth than the other student books. He also included many more cases so that what he was providing was a more complete picture of the common law of contract than that contained in those other texts. He also refused to shy away from complexity so that his book examined topics that were not addressed at all in the other books (a classic example being his chapter on 'plurality of parties').

Another distinctive feature of his book, although not mentioned by him, was the full and careful attention he paid to statutes. A table of statutes had first been included in *Anson on Contract* in the 19th edition in 1945. Right from the start, Treitel was concerned to give statutes the central importance they merited and he integrated common law and statute in describing and understanding the law of contract. Although Treitel's first love was the common law, he had unrivalled skills in being able to work with statutes and to make them comprehensible. His ability to explore the scope and application of statutes was just as great a feature of his work as was his attention to the detailed reasoning of the judges in areas of pure common law.

(2) Black-letter law/practical legal scholarship

While conscious that his work was so described, Treitel did not like the academic derision that often lay behind the term 'black letter law', especially in the United States academy. He explained that he stopped his lecturing visits to Charlottesville, Virginia, despite continuing invitations:

[B]ecause at that time the Law and Economics movement held sway in the Law School there with an almost religious fervour; and my apostasy in that regard did not go down well with its high priests. ... 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 this or that theory which was perceived as being the only one in which academic discourse was to be conducted ... 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

– 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.¹⁴

While I think it is a better strategy to defend ‘black letter law’ rather than seeking to deny its existence, one can easily avoid the unwelcome baggage that may go with the label by referring instead to ‘practical legal scholarship’. And there is no doubt that Treitel’s textbook did epitomise practical legal scholarship or, more precisely, a particular type of practical legal scholarship. In understanding Treitel’s contribution, it is an important exercise to try to identify in detail the precise approach to, and style of, practical legal scholarship that Treitel’s textbook adopted.

(3) The features of Treitel’s brand of practical legal scholarship

In considering this, I would suggest that there are ten important features of Treitel’s form of practical legal scholarship as exhibited by his textbook (and I here go no further than the last edition of the book for which he was responsible ie the 11th edition in 2003).

(i) Detailed clarity, comprehensivity and complete accuracy

The writing in Treitel’s textbook is very precise and succinct with not a word wasted. The clarity of thought and mastery of the subject matter shines through. Although that makes it readable, it is a slow read precisely because so much careful analytical thinking is packed into the account. When I was a student in the 1970s, I bought all three of the recommended textbooks, *Anson, Cheshire and Fifoot*, and *Treitel* and found all three very useful. But there is no doubt that, for a student, Treitel was the most difficult of the three (tutors tended to say that only the best students should use it) albeit that it had great merits, including its comprehensivity and complete accuracy.

(ii) Internal coherence not deep theories

Treitel’s explanations of the law were closely tied to the reasoning of the judges and, to the extent that they went beyond that, they were rooted in history and the pursuit of internal coherence. What I mean by the latter may be illustrated by the following example. In discussing the reasons for the benefit aspect of the doctrine of privity

(whereby a third party has no right to enforce a contract to which it is not a party)

Treitel wrote this:

A system of law which does not give a gratuitous promisee a right to enforce the promise is not likely to give this right to a gratuitous beneficiary who is not even a promisee. The doctrines of privity and consideration, though not identical, are intimately connected. This connection helps to explain the development of the doctrine of privity.¹⁵

But underlying deep theories, whether, for example, economic analysis or moral reasoning, find no place in his account. Nor do ideas such as the tension between market individualism and consumer welfare. Rather, the law is presented as a sophisticated but autonomous body of rules driven by logic and practicality.

(iii) Rules and exceptions

To produce a coherent account across such a wide area, one technique is to focus on the key cases and principles and to leave out complications. That was very much *not* Treitel's approach. His technique to produce coherence was one of articulating general rules followed by potentially numerous qualifications or exceptions to them. We see this from the very first page of his textbook. A contract we are told is 'an agreement giving rise to obligations which are enforced or recognised by law.' But we are then informed that there are qualifications that need to be made to this, such as the objective approach to agreement and the implication of terms by law. In chapter 2, it is stated that Agreements are usually made by offer and acceptance, but in some cases this 'analysis is impossible or highly artificial'.¹⁶ A principal exception given is multipartite agreements as in *The Satanita*.¹⁷ Similarly, in relation to consideration, the doctrine and its application are set out at length. But then we come to a section headed 'Special Cases' which refers to either clear exceptions to the need for consideration (such as letters of credit) or where particularly careful reasoning is required in order to decide that there is consideration (as eg in relation to unilateral contracts).

(iv) Limited criticism

Although there are criticisms of the case law and indications of solutions and reforms, they are relatively rare and are quickly and lightly and often tentatively offered. An example is Treitel's comments on the case of *Dickinson v Dodds*,¹⁸ which laid down

the rule that withdrawal of an offer may be communicated to the offeree by a third party and need not be by the offeror.

The rule that communication of withdrawal need not come from the offeror can be a regrettable source of uncertainty. It puts on the offeree the possibly difficult task of deciding whether his source of information is reliable, and it may also make it hard for him to tell exactly when the offer was withdrawn. ... Certainty would be promoted if the rule were that the withdrawal must be communicated by the offeror, as well as to the offeree.¹⁹

In relation to 'invented consideration' Treitel wrote: 'The courts have not been very consistent in the exercise of this discretion and its existence is a source of considerable uncertainty in this branch of the law.'²⁰ He is perhaps somewhat less reticent in his criticism of statutes. For example, he wrote of the Law Reform (Frustrated Contracts) Act 1943, 'contracts for the sale of goods should have been wholly excluded from the operation of the Act of 1943. Their partial exclusion does not satisfy the requirements of either convenience or justice.'²¹

(v) Almost exclusive reliance on primary sources

There is very little reference to academic work. Although there are some references in footnotes, there is virtually no examination in the text (with the exception of the views of, for example, law reform bodies) of particular academic views, and certainly no attempt to engage directly with them by discussing in the text their strengths and weaknesses. What one has, therefore, is almost complete reliance on primary sources, whether cases or statutes. In similar vein, there is surprisingly little use made of hypothetical examples – a very common academic technique – to test out what the law is. The impression given is that the case law is so rich that, when fully unearthed, one will find all the examples one needs.

(vi) Richness of detail

The wealth of information contained within the book is breathtaking. It is plain that the research behind it has been pain-staking. It follows that one can almost always find some help if one is stuck on a point. Just to give one example, some years ago I was puzzled as to what is meant by a deed poll. I mentioned this to Guenter over lunch. He explained the position to me and said that I would find this in his book. Sure enough

the distinction between deeds inter partes and deed polls was carefully explained, albeit somewhat hidden away under a subsection on the Law of Property Act 1925, s 56, which itself fell under the wider heading of statutory exceptions to the privity doctrine.²²

(vii) Loss of big picture?

The big danger of trying to present all the details of the law is that one loses sight of the bigger picture. More specifically, in reading Treitel's account, it would be difficult for many students to work out which should be regarded as the leading cases and which are relatively subsidiary. There are so many cases – some of them obscure – referred to in the text, let alone in the footnotes, that it can be difficult to detect which are the ones that really need to be focussed on. Here I think lies the weakness of Treitel as a student text compared to *Anson and Cheshire and Fifoot* (a weakness that was not so apparent in the first edition but became ever more problematic in later editions). Those texts would not only tend to exclude material that is marginal and complex but would also tend to highlight the leading cases more prominently by discussing them in greater detail. A classic example of this was Treitel's account of the famous case of *Central London Property Trust Ltd v High Trees House Ltd*.²³ The wider significance of that case was lost within the details of Treitel's discussion of common law and equitable waiver and forbearance and even the label of promissory estoppel was not used by him. The idea that the doctrine of promissory estoppel posed a major threat to the doctrine of consideration becomes lost in his exposition.

(viii) Lack of interest in taxonomy

A further feature of Treitel's work is that he was not especially interested in taxonomy and structure. In the Preface to his first edition, he clarified that he was departing from what he saw as the problematic division of the subject into Parts. 'I have abandoned the traditional division of the subject into "parts" as this seemed to raise more problems than it solved.' This is surprising because, given Treitel's tight analytical mind, one might have expected that a clear structure, set out in Parts, would have appealed to him. But ultimately it appears that he was concerned that this would unnecessarily constrain his practical analysis. Moreover, he was no doubt conscious that judges had not found it necessary to refer to any particular taxonomy. As it was, he set out in

general terms how the book fitted together at the end of his first chapter where he explained that

the law of contract is concerned with the circumstances in which agreements are legally binding [and thus] it deals mainly with the two questions of agreement and legal enforceability. ...

[There are also] the rules relating to plurality, privity, assignment, transfer of liabilities and agency [which] determine who is bound by, and entitled to the benefit of, an agreement. The rules relating to remedies assume the existence of an enforceable agreement, and deal with the precise methods of enforcing it. These methods are in principle determined by law [rather than by the agreement].²⁴

However, it was clear that, for Treitel, the structure and taxonomy of contract law was of less importance than making sure that one covered the law that was within, *or directly relevant to*, the law of contract. Contract was, in this sense, a contextual rather than a conceptual category. We see this most clearly in his treatment of restitution. Restitutionary remedies are dealt with throughout in relation to various ineffective contracts (such as void, voidable or illegal contracts) and are discussed in detail in the chapter on remedies for breach of contract. There is no recognition that, for example, the restitution of money for total failure of consideration, following termination of the contract for breach, does not obviously fall within Treitel's description of the relevant remedies as being concerned to *enforce* the contract (ie that it is not a remedy *for* breach of contract). In general, his treatment of restitution shows little recognition or acceptance of there being a law of unjust enrichment that, conceptually, should be distinguished from the law of contract.

(ix) Eccentricities

While a great strength of Treitel's work was its accuracy and careful attention to detail, there were a few unhelpful eccentricities or peculiarities in his description or analysis of the law. I shall briefly give six examples. First, he had a chapter headed 'standard form contracts' which almost entirely comprised an examination of exemption clauses. The heading 'standard form contracts' (rather than 'exemption clauses') does not fit well with the sequence of chapters because plainly most of the rules of contract – and hence the other chapters of the book – apply equally to standard form contracts as to

other contracts. Moreover, there can be exemption clauses outside standard form contracts. Secondly, there was virtually no discussion at all of the interpretation of contracts. This most important aspect of contract law – on which whole books have been written – was confined (with the exception of exemption clauses) to just one paragraph under the parole evidence rule.²⁵ Although it is true that English academics generally did not wake up to the importance of interpretation until the discussion by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society*²⁶ – and there was a similar neglect in *Anson and Cheshire and Fifoot* – there were discussions in other books and one might have expected Treitel to have seen the huge practical importance of this topic. Thirdly, he preferred the terminology of ‘rescission’ for breach and persisted with it, long after it had become clear that the more accurate and less confusing terminology was ‘termination’ (or ‘discharge’) for breach. Fourthly, he adopted a very difficult approach to mistake at common law which drew an impossible distinction between mistake nullifying consent and mistake negating consent. Fifthly, he persisted with a notion of ‘fundamental terms’²⁷ even after it had become clear that there are only three types of term – conditions, warranties and innominate terms – and that ‘fundamental breach’ is a rule of construction and is not a rule of law. Sixthly, some of his analysis of the law on damages is confusing and unhelpful. It is clear that, looking back at the first four editions, he was suddenly influenced in writing the fourth edition by having read Fuller and Perdue, ‘The Reliance Interest in Contract Damages’.²⁸ But the consequent inclusion of a new section on ‘compensation for what?’ is highly misleading in treating reliance damages and, even worse, an award of restitution as if they protect valid interests within the law of contract when the truth of the matter is that damages for breach of contract are solely concerned to put the claimant into as good a position as if the contract had been performed.²⁹ This may be regarded as the only obvious example of Treitel placing excessive reliance on an academic article and being led astray by so doing! But he was also uncharacteristically loose in other aspects of the application of the compensatory principle: hence his support, for example, for the minority judges in *Golden Strait Corp v Nippon Yusen Kubishika Kaisha, The Golden Victory*³⁰ (who, indeed, relied on his flawed case note on the Court of Appeal’s decision).³¹

(x) *New editions*

Treitel took a particular approach to new editions. It was made clear in various prefaces that the new edition was not merely an updating exercise of including new material but gave him the opportunity to put forward his own new thinking. He explained his approach as follows:

[A] considerable amount of rewriting and what might be called reconceptualisation was required for each of these new editions as I had set my face against the commonly held view that a new edition of a legal text involved no more than a process of “updating”.³²

Very commonly, as he made clear in the various prefaces, about a quarter of the text was new in each edition. This was all very well and to be applauded. However, because he was so anxious to be comprehensive, and because of the explosion in law reporting, successive editions of Treitel became ever longer and more difficult. The arrival on the market of superb shorter books on contract meant inevitably that students tended to turn away from Treitel and it has tended to become seen as a practitioner work and a reference work for students rather than as a student text.

6. Merits of practical legal scholarship

The features explored above mark out Treitel’s particular brand of practical legal scholarship. I anticipate that, for some in the legal academy, his work will be regarded as being of marginal importance and may even be dismissed as largely irrelevant, old-fashioned and dull. The modern trend is to regard true legal scholarship as being theoretical rather than practical and as being concerned not with the details of the law but with the deep level principles and policies that, looking in from the outside, may be said to underlie the law. The intended readership is increasingly fellow academics alone and not also practitioners and judges. The research and study of law is increasingly seen, within law schools, as divorced from law as a practical discipline and as being a non-autonomous branch of, for example, the social sciences. Careful analysis of the details of the case law and statutes is, increasingly, not the modern name of the game in our law schools. In my view, this idea that practical legal scholarship is not true legal scholarship or has less value than deep theoretical accounts of the law urgently needs to be dispelled.

I have elsewhere put forward a detailed defence of practical legal scholarship against the modern trend in many law schools of dismissing it as being of limited worth.³³

Professor Jane Stapleton has similarly called for the importance of this form of scholarship to be recognised.³⁴ Since joining the Supreme Court, my appreciation of the importance of such scholarship has, if anything, been strengthened. I do not wish to repeat all of what I have said elsewhere on this topic but, in defending Treitel's work, I shall here make three brief points in defence of practical legal scholarship.

First, practical legal scholarship matters because that is the style of scholarship that is used by, and is relevant to, judges and practitioners in deciding cases in the English courts. The judges want to hear legal argument, based on precedent, in order to arrive at an answer to the factual question before them that not only satisfies their intuitions, but is also justified according to legal rules and principles. Law as applied in the courts is a system of practical reasoning focused on providing answers to factual disputes. In the light of that, there seems to be every good reason why legal research should apply the same techniques. If the English courts are not using, for example, economic analysis, or insights from sociology or deep philosophical theory in deciding cases – and clearly they are not – it is hard to see why one should regard those as primary tools of analysis. Surely, at least in the first instance, it is justifiable to analyse a case using the language and approach adopted by those arguing and deciding the case. This is not to deny that other approaches may be interesting and relevant. But that they should be seen as a substitute for – or as somehow more important than – practical legal reasoning seems perverse. As Lord Rodger wrote:

[O]ne has to wonder whether it is altogether satisfactory for academic writers to go direct to the more theoretical aspects of a subject without ever really engaging with the nitty-gritty of how it actually operates in practice.³⁵

In other words, studying law first and foremost requires that one truly knows and understands the details of the law; and one acquires that knowledge and understanding by practical legal reasoning.

Secondly, it may of course be that those who criticise the practical legal scholars, or seek to downgrade their status, do so because they find the autonomous study of law boring and unchallenging. Some find grand, high-level theories, even if removed from practicality, far more interesting than picking through fine working detail. I have heard it said that practical legal scholarship amounts to nothing more than mindless description that could be carried out by anyone with half a brain. The clever ones are

those who develop the grand theories. For someone who finds the details of the law endlessly fascinating and, in many respects, extremely complex – so that to obtain a true understanding of the concepts and principles is very challenging – it is hard to see how all this can be regarded as either easy or dull.

Thirdly, I am not suggesting that practical legal reasoning is the only form of analysis worthy of pursuit by legal academics. Different forms of analysis, and critiques, of the law plainly have a role to play. So, for example, I applaud the work of those engaged in socio-legal studies, just as I do the work of great figures of jurisprudence. Ideally all law students, while not sacrificing the core focus on doctrine, should have some exposure to legal history, sociological theories of law, philosophical reasoning and economic analysis. Indeed, there is indisputably a very difficult question for every practical legal scholar as to how deep a theory one needs to have in order to make sense of the law, while remaining intelligible to those who have to decide and argue about particular facts. I have friends who are professional philosophers who seem to think that almost everything that any lawyer says in so-called legal reasoning is hopelessly superficial. However, my essential point is that, precisely because law (unlike philosophy) is a practical subject, practical legal reasoning and scholarship should remain at the core of legal research and training, such that it would be quite wrong for that type of reasoning to be relegated to the side-lines. At our core, legal academics must be able to talk the language of, and interact with, those who are practising law, whether as barristers, solicitors, judges or legislative drafters. Yet, in many law schools, it is that doctrinal core that is under attack.

In my view, therefore, Treitel's work as a practical legal scholar has been, and remains, of great and central importance in our understanding of the English law of contract. In general terms, his sort of scholarship – practical legal scholarship – needs to recover its place at the heart of our law schools.

Having said all that, there are three aspects of Treitel's particular and extreme brand of practical legal scholarship that I would not seek to defend. On the contrary, these seem to me to be serious weaknesses in his scholarship.

First, Treitel's almost exclusive focus on the primary sources – the cases and statutes – means that in some ways his work diminishes the role of the practical legal scholar. The advocate in the appellate court and law students alike can gain greater

understanding from what legal academics, engaged in practical legal scholarship, have to say about the cases and statutes. Not to engage seriously with those debates is to rob the reader of potentially important insights. True it is that Treitel would look carefully at law reform proposals of, for example, the Law Commission. But he barely devoted any time looking at the writings of academics.

Secondly, and linked to the first criticism, is that Treitel's work may lead one into the false impression that practical legal scholarship tends to shy clear of criticisms of the law and is not a creative form of reasoning. In general, that is a false perception as shown by the vigorous debates among practical legal scholars about the merits of the latest case. Take, for example, the law of unjust enrichment. No one could seriously suggest that practical legal scholarship in that area does not involve criticism of the law.

Thirdly, as I have already indicated, Treitel's obsessive concern with collecting all relevant cases became counter-productive in leading to a loss of clarity in seeing the bigger picture. What the appellate courts (as well as law students) need from practical legal scholars is help in seeing a particular case in its wider context. The bigger picture is essential in order for the law to develop coherently. Legal academics are in a strong position to provide that bigger picture but, to do so, they need to cut through some of the detail. Treitel's incisive mind sometimes allowed him to do so. But too often his account is so rooted in the mass of cases that one may struggle to see the wood for the trees.

7. Conclusion

I consider myself very fortunate to have come to know Guenter well during our time together as Fellows at All Souls. Prior to then I had admired his work. But when I came to know him better, it was his general knowledge and wit and laughter that became almost as important. His many anecdotes, carefully and precisely told, made him a sparkling companion.

Guenter's life and work were forever shaped by his escape from Germany in 1939. Looking back on those early years, and the kindness shown to him on arrival in England, meant that Guenter believed that he owed a huge debt to this country. Although one may debate the strengths and weaknesses of his particular brand of

practical legal scholarship, there is no doubt in my mind that one can truly say of the man and his work that his repayment was sweet indeed.

¹ GH Treitel, 'Lecture to the Oxford Chabab Society' (September 2012) <<https://vimeo.com/48474737>> accessed 11 August 2021.

² GH Treitel, 'A German Childhood 1933-1942: Persecution and Escape' (2020) 28 *Zeitschrift für Europäisches Privatrecht* 591 (with forewords by Reinhard Zimmermann and Birke Häcker).

³ *ibid* 601.

⁴ *ibid* 609.

⁵ *ibid* 610.

⁶ J Goudkamp and D Nolan (eds), *Scholars of Tort Law* (Oxford, Hart Publishing, 2019).

⁷ He remained as author for that chapter for the 2nd edn in 2007 (edited by Andrew Burrows) before handing over the chapter to Ewan McKendrick for the 3rd edn in 2013 (also edited by Andrew Burrows).

⁸ *Taylor v Caldwell* (1863) 3 B & S 826, 112 ER 309.

⁹ PS Atiyah, *Consideration in Contracts: A Fundamental Restatement* (Canberra, Australian National University Press, 1971).

¹⁰ GH Treitel, 'Jane Austen and the Law' (1984) 100 *LQR* 549.

¹¹ J Goudkamp and D Nolan, 'Pioneers, Consolidators and Iconoclasts: The Story of Tort Scholarship' in Goudkamp and Nolan (eds) *Scholars of Tort Law* (n 6) ch 1.

¹² Cf Todd Rakoff's analysis, in his workshop paper on Williston, as 'unabashedly doctrinal'. I have steered clear of the further debate, wonderfully explored by Rakoff in relation to Williston, as to whether Treitel was a formalist and what precisely is meant by that term. But certainly my perception is that Williston was a more creative and wide-ranging doctrinal scholar than Treitel.

¹³ GH Treitel, 'Vicissitudes of an Academic Lawyer' (2019) 26 *Zeitschrift für Europäisches Privatrecht* 133, 152.

¹⁴ *ibid* 168. I was very pleased to read Todd Rakoff's comment, in his workshop paper on Williston, indicating that, contrary to what is often thought, doctrine is not dead in the USA: 'At the least, courts still cite doctrine and contracts professors, on line, frame questions to each other in doctrinal terms; perhaps everyone is playing a deep game, but, while doctrine is surely not everything, I doubt it is nothing.'

¹⁵ GH Treitel, *The Law of Contract*, 11th edn (London, Sweet & Maxwell, 2003) 588.

¹⁶ *ibid* 47 (footnote omitted).

¹⁷ [1895] P 248 (CA), *affd sub nom Clarke v Dunraven* [1897] AC 59 (HL).

¹⁸ (1876) 2 Ch D 463 (CA).

¹⁹ Treitel, *The Law of Contract*, 11th edn (n 15) 42.

²⁰ *ibid* 71.

²¹ *ibid* 919.

²² *ibid* 669 (now para 14-131). I was made acutely conscious of Treitel's thoroughness when he emailed me a few years ago saying that he was having difficulty locating the judgment of the Court of Appeal, given by Vos LJ, in a case called *Nextia* which had been referred to in a subsequent Court of Appeal decision. 'Andrew', he wrote, 'you're good at finding cases on the internet. Could you find a copy of Vos LJ's judgment for me?' So I duly investigated and discovered that, unusually, Vos LJ had ordered that his judgment should be restricted to the parties and should not be made public. Presumably the later Court of Appeal had then been given the judgment by one of the parties. So I reported back to Guenter, thinking that I would be putting his mind at rest, that as there was no public record of the decision he could safely ignore it. But that was not good enough for Guenter. A week later, I walked into lunch and he gave me a beaming smile and raised his thumbs. 'I've got that *Nextia* case' he said. 'Somehow Professor Beale managed to get hold of it for me'. 'Did it say anything of interest?' I asked him. 'Oh no', he said, 'nothing of interest at all' but added, triumphantly, 'but now I know it said nothing of interest at all'.

²³ [1947] 1 KB 130 (KBD).

²⁴ GH Treitel, *The Law of Contract*, 1st edn (London, Stevens, 1966) 5-6. This passage was retained, subject to minor modifications, in the eleventh edition: Treitel, *The Law of Contract*, 11th edn (n 15) 6.

²⁵ Treitel, *The Law of Contract*, 11th edn (n 15) 197.

²⁶ [1998] 1 WLR 896 (HL).

²⁷ See also GH Treitel, *Some Landmarks of Twentieth Century Contract Law* (Oxford, OUP, 2002) ch 3.

²⁸ LL Fuller and WR Perdue, 'The Reliance Interest in Contract Damages' (1936) 46 *Yale Law Journal* 52.

²⁹ See A Burrows, 'Comparing Compensatory Damages in Tort and Contract: Some Problematic Issues' in S Degeling, J Edelman and J Goudkamp (eds), *Torts in Commercial Law* (Pyrmont NSW, Thomson Reuters, 2011) 367, 385–90.

³⁰ [2007] UKHL 12, [2007] 2 AC 353.

³¹ GH Treitel, 'Assessment of Damages for Wrongful Repudiation' (2007) 123 *LQR* 9.

³² Treitel, 'Vicissitudes of an Academic Lawyer' (n **Error! Bookmark not defined.**) 159.

³³ A Burrows, 'Challenges for Private Law in the 21st Century' in K Barker, K Fairweather and R Grantham (eds), *Private Law in the 21st Century* (Oxford, Hart Publishing, 2017) 29, 32–40.

³⁴ J Stapleton, *Three Essays on Torts* (Oxford, OUP, 2020).

³⁵ A Rodger, 'Judges and Academics in the United Kingdom' (2010) 29 *University of Queensland Law Journal* 29, 36.