

BOOK REVIEWS

Contractual Non-Disclosure by Anthony Duggan, Michael Bryan and Frances Hanks (Australia: Longman, 1994) pages i-xxii, 1-208, Bibliography and Index 209-225. Price \$58 (soft cover) ISBN 0 582 875 846.

The new book entitled *Contractual Non-Disclosure* from co-authors Anthony Duggan, Michael Bryan and Frances Hanks is a highly readable law book. The immediate attraction of the book lies in the format: it presents a detailed study of non-disclosure and contractual theory in a very succinct, informal, almost conversational manner. This approach fits in very well with the structure of the book, which poses various different case studies on the issue of non-disclosure and then carries out a broad ranging jurisprudential examination of them.

One of the highlights of the book is the opening chapter. It is this chapter which introduces the ethical discourse associated with contractual non-disclosure. Fundamental jurisprudential theories relating to non-disclosure are presented and examined in order to highlight the essential moral questions underlying contractual non-disclosure.

The primary ethical theorist introduced in this chapter is Cicero. According to Cicero, the person who intentionally refuses to reveal knowledge in order to make a profit is morally unsound, although not necessarily in contravention of the law. Cicero's classic example of the grain merchant delivering grain in a time of famine and being unsure whether to reveal to the purchasers the fact that other ships carrying grain are on the way, provides an excellent foundation for the ensuing moral debate. The dialogue presented by Cicero between Antipater and Diogenes on the question of the grain merchant's obligation to disclose encapsulates the ethical dichotomy. Diogenes feels there is nothing wrong with silence provided the grain merchant remains truthful. Antipater on the other hand believes the information should be revealed. The differing approach taken here provides the fundamental theme for the rest of the book.

One of the most powerful issues to emerge from the introductory chapter is the apparent segregation of pure ethical theory from the practical application of the law. It becomes clear that while a person may be a 'shifty, deep, artful, treacherous, malevolent, underhand, sly, habitual rogue'¹ they will not necessarily be transgressing the law.

A moral hierarchy is introduced and this is juxtaposed with the approach the law takes to the regulation of transactional behaviour. Cicero bases the need for disclosure upon shared community bonds. His ethical idealism is subsequently modified by the authors through the further examination of other theories more

¹ Cicero, *De Officiis*, bk III, ch 13 (1960 trans) cited in Anthony Duggan, Michael Bryan and Francis Hanks, *Contractual Non-Disclosure* (1994) 2.

directly focused upon ethical considerations pertaining to particular types of contractual arrangements. Grotius² justifies disclosure on the grounds of a special relationship existing between the parties. Similarly, Aquinas³ considers that disclosure in particular circumstances is justified where it would prevent loss or damage to the buyer. Pufendorf⁴ sets out that disclosure is necessary in particular transactions to ensure a just price and Pothier⁵ considers that disclosure is necessary within contracts generally to ensure justice and equality.

The theoretical analysis provides the central thesis for the book: to what extent do or should law and moral idealism overlap? The introductory chapter provides an insight into the theoretical perspectives whilst at the same time highlighting the law/ethics chasm. Contractual non-disclosure is used as a springboard for a more detailed consideration of how, or indeed whether, the gap between legal regulation and behavioural idealism can be bridged. Furthermore, in attempting to achieve a satisfactory equilibrium, the authors pose the more interesting question: should positive legal standards be imposed or, alternatively, should the law simply assume a more regulatory role in reprimanding excessive conduct which transcends established moral or behavioural thresholds?

The non-disclosure issue functions as the perfect paradigm for this debate because of its integrated status. On the one hand non-disclosure in a contractual context raises substantive legal questions concerning the basic validity of the transaction and on the other, raises fundamental moral questions concerning correct and incorrect behaviour. The issues relating to contractual non-disclosure allow the authors to examine the relevant questions rather than categorically enunciate the law. This is where the real strength of the book lies.

In chapter two an examination of 'the law' is carried out. This chapter undertakes a close consideration of common areas where non-disclosure may be raised including mistake, misrepresentation, unconscientious dealing, fiduciary non-disclosure and insurance contracts. It is at this point that the twenty-seven case studies⁶ become relevant. In examining the substantive legal issues, the authors set up a basic case study concerning an art dealer wishing to sell a painting. In each study the facts are slightly varied so that alternative legal conclusions may be considered.

It becomes very clear that non-disclosure per se, except perhaps in insurance contracts, will not be actionable. It must be shown that the non-disclosure constitutes some form of unconscionable conduct in order for any relief to be awarded. This, as the book correctly points out, is quite a circular process. The whole issue appears to be centred around whether or not the non-disclosure, on the particular facts, is sufficiently unfair to justify the intervention of equity.

² Duggan *et al*, above n 1, 6.

³ *Ibid*.

⁴ *Ibid* 11.

⁵ *Ibid* 9.

⁶ *Ibid* xvi-xxii.

Unless the non-disclosure can effectively constitute an actionable misrepresentation at law, we are essentially left with either unconscientious dealing or a breach of fiduciary obligation. The authors accurately point out that there can be no generalised principles in these areas as it will very much depend upon the individual circumstances and the particular moral perspective which a court assumes.

The authors note that if the rule of law is to have any influence in shaping community attitudes concerning acceptable behaviour, some legitimate, rationalised structure is necessary. Ad hoc determinations of what constitutes moral and immoral behaviour are inappropriate. Furthermore, and here the authors go back to their fundamental theme, the gap between ethics and equity still remains. If legal sanctioning is imposed, a distinguishing rationale other than vague precepts of morality needs to be drawn upon otherwise, potentially at least, anything perceived to be unethical may be illegal. This broad homogenous approach is precisely the 'legal' approach which the authors attempt to avoid. The economic analysis, which is considered in chapter five, would tend to avoid these difficulties.

Chapter two carefully examines the obligation to disclose in a fiduciary context. The authors point out that in this area the issue is not so much whether a duty to disclose arises, but whether a fiduciary relationship exists and if so, what is its character. Once again, reference is made to the case studies.

The approach of the book in dealing with fiduciary duties is, however, somewhat strained, as the case studies do not appear to provide a sufficient range for the analysis of the fiduciary concept. Where a fiduciary relationship is imposed in a non-contractual relationship and the subject matter of the relationship does not lend itself to opinion and advice, it may well be that the fiduciary does not have a duty to disclose. As the discussion is focused around the case studies, a broader analysis of fiduciary obligations is somewhat impeded. Nevertheless, this does not detract from the quality of the fiduciary analysis as each case study is individually examined and distinguished from other similar situations.

Ultimately the 'law' chapter proves extremely illuminating not only for the way in which it approaches the legal issues relating to contractual non-disclosure, but more generally, for its integrated approach to the equitable doctrines which are examined. By the end of the chapter it is clear that the pervading sense of circularity apparent in individual equitable doctrines associated with non-disclosure is very much a consequence of the interplay between law and ethics. The discursive approach adopted by the authors ensures that not only the actual law, but also the underlying fairness issues, are properly conveyed.

Chapters three to five deal with the essential contractual theories associated with contractual non-disclosure. As the authors have already set up the legal infrastructure for contractual non-disclosure, the remaining chapters are devoted to a more jurisprudential analysis. The chapters are divided according to perceived policy justifications underlying the constrained approach of the

law. These justifications can be summarised as follows: the public interest associated with contractual finality (set out in chapter three as 'autonomy'), the importance of informed consent (set out in chapter four as 'fairness') and the need to preserve incentives for discovery and exploitation of information (set out in chapter five as 'economics').

Chapter three carries out a comprehensive examination of subjective and objective will theory. This chapter is particularly strong as it works very well in bringing the pieces together. It is interesting in its juxtaposition of the will theory as an effective moral justification for promissory enforcement on a primary analysis, but as an artificial, non-discriminating philosophy on any more detailed contractual analysis. While some readers may be in doubt as to exactly what approaches come within the apparent vortex of the nineteenth century *Volksgeist*,⁷ the authors clearly enunciate the difficulties associated with generalist contractual theories in this area.

Chapter four deals with fairness. This chapter is not as focused in its objectives. It considers non-disclosure in terms of basic tenets of fairness. The broad notion of fairness, introduced by Cicero, is drawn upon. Altruistic concepts of community welfare, good faith and societal expectations are considered. The difficulty is that these concepts are not effectively tailored into the law/ethics debate. Up to this point the authors have considered the moral dilemmas in terms of the legal infrastructure; it is only here that the focus becomes a little hazy. It is unclear how or indeed whether these concepts impact upon the legal approach to non-disclosure. The jump from contractual legal theory to a more general fairness assessment tends to interfere with the logical consistency of the book.

This chapter makes reference to the good faith analysis by Holmes whereby each party would be held to 'that degree of responsibility [that] fits to the expectations of the other party'.⁸ Holmes goes on to point out that disclosure requirements will depend upon the nature of the contract so that considerations such as the importance of the undisclosed material, accessibility, trade custom, the nature of the contract and the status and relationship of the parties will all be relevant. Ultimately, it is difficult to see how this generalist, unstructured approach differs substantially from the previous analysis in the autonomy chapter. This is not to suggest that a separate chapter is not useful but rather, that greater attention could have been paid to unifying or connecting ideas.

The broader contractual theories are interesting, but as the authors themselves suggest, tend to lack precision and structure. Scheppele's distinction between catastrophic and non-catastrophic loss, deep and shallow secrets and equal and unequal access⁹ provides little illumination on the non-disclosure issue. Whilst Trebilcock considers Scheppele's analysis to constitute an *ad hoc* rationalisation

⁷ Ibid 101.

⁸ Ibid 130.

⁹ Ibid 139.

of existing case law,¹⁰ surely the same allegation can be made of most fairness based theories in this area. The essential difficulty is that ultimately any contract theory centred around conceptions of fairness alone will necessarily adopt an individualised approach.

The final chapter dealing with economics is extremely satisfying and works well as a summation for the whole book. The basic position which the authors assume is that the economic rationale for the reticence of the law in dealing with non-disclosure is ultimately justifiable in terms of efficiency. Efficiency arguments are divided into two basic concerns: the need to preserve incentives for the discovery of new information and the need to minimise mistakes in the contracting process.

The authors suggest that the economic efficiency rationale is the more convincing because of the inherent vagaries surrounding the fairness and autonomy based theories. While it is clearly possible to reject this conclusion under an ethics based assessment, it cannot be denied that the book presents an extremely persuasive case for the legitimacy of economic concerns. The economic analysis justifies the lack of legal intervention in non-disclosure in purely instrumental terms. Contractual promises are not considered in terms of any moral value but rather in terms of efficiency: is it economically viable to enforce a contract or set it aside? In these terms, economists such as Kronman¹¹ suggest that a disclosure rule is unlikely to encourage property owners to disclose facts as they are likely to discover them through self-investigation anyway. Hence a rule relating to contractual non-disclosure is not required because efficiency concerns would require, for example, a home-owner to check for termites; this would apply whether or not a legal duty of disclosure existed.

In conclusion, the book is a study in contract theory or perhaps more particularly, as the authors themselves note, the inevitability of applied jurisprudence and contract theory in a modern legal infrastructure.¹² The central concern of the book is the issue of non-disclosure: what approach the law takes, why it assumes this position and the possibility for development or change. Nevertheless, it is possible to regard the non-disclosure issue as a secondary examination, providing the foundation for a deeper study of fundamental questions underlying the law of contract as a whole.

The book excels in its thoughtful analysis of the moral dimensions of non-disclosure and the consistent reference to the case studies provides for a more integrated analysis. The ultimate preference given to the economic theory does not detract from the quality of the ethical debate. In light of the obvious flaws associated with the autonomy and fairness theorists in this area, it is not surprising that economics ultimately provides the more convincing rationalisation. This is not to say, and certainly the authors make this known, that it is the most satisfying justification. In Cicero's example, if disclosure of other ships

¹⁰ *Ibid* 202.

¹¹ *Ibid* 158.

¹² *Ibid* 15.

carrying grain would not adversely affect incentives to engage in productive activity, it could be compelled. This certainly saves us the tortuous journey into moral hierarchies, although at the same time it tends to thwart a deeper analysis of contractual ethics. This book provides an interesting, stimulating and intellectual analysis of the legal, ethical, social and economic implications of contractual non-disclosure; for contract lawyers, theorists and legal jurisprudential discussion generally it does provide a clear indication that there is something new under the sun.

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