**Leading Cases in Contract Law: A Guide to the 100 Most Frequently Cited Judgments in Contract and Related Subjects** by Daniel Reynolds and Lyndon Goddard, Federation Press, Sydney, 2017, ISBN 9781760021467, $79.95, 240pp.

Following closely on the publication of the authors' *Leading Cases in Australian Law* (Federation Press, 2016) and adopting a similar methodology, *Leading Cases in Contract Law* seeks to identify and explain those contract decisions which are most frequently cited in Australian courts. Both the work under review and its predecessor are modelled on the now-defunct *Smith's Leading Cases*, a series which began in the 19th century and which eventually ran to 13 editions, the last of which was published in 1929. As in the authors' earlier work, *Leading Cases in Contract Law* goes beyond the mere provision of facts and holdings, and includes commentary which is aimed at placing each case in its broader context.

One might be forgiven for wondering at the need for a reference work of this type in 2017. Much of the utility of *Smith's Leading Cases* was its provision of a compact reference volume to which quick recourse could be had by busy practitioners. The advent of readily searchable databases and other digital research tools largely obviates the need for this type of reference work today. Indeed, given the rapid pace of legal change, it would be a foolhardy practitioner who opted to rely upon such a text when seeking to clarify a difficult point of law. It is doubtful, then, that *Leading Cases in Contract Law* will attain the same currency amongst practitioners as did its forebears.

The true value of *Leading Cases in Contract Law* is found not in its practical utility for the student or practitioner, but instead in its provision of a picture of the current state of the Australian law of contract. It is, accordingly, best thought of as a somewhat unorthodox work of empirical research. Rather than subjecting a relatively narrow range of decisions to close empirical analysis, the authors have instead applied an empirical lens to a large body of law with a view to identifying the decisions which seem to have the greatest importance. The question then becomes whether any insights can be drawn from the results, and, if so, what those insights are.

There are two points which should be made upon a consideration of the 100 cases identified by the authors. The first is the overwhelming preponderance of Australian decisions — in particular, decisions of the High Court of Australia — and the concomitant paucity of English authority. Only 18 English decisions are included in the collection, if one includes the decision of the Privy Council in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266, an appeal from a decision of the Full Court of the Supreme Court of Victoria. Though the emergence of a distinctively Australian law of contract has been gradual, the results of this survey of leading cases confirms that Australian courts today look predominantly to Australian decisions when seeking to ascertain the core principles of the law of contract. At the same time, the list of cases is notable for the absence of any authorities from elsewhere in the common law world.

The second key insight to be drawn relates to the way in which the survey

highlights the faultlines and controversies in the Australian law of contract. Most notable in this respect is the fact, explicitly noted by the authors (p xiii), that almost a quarter of the decisions included in the work relate to various aspects of contractual interpretation. Indeed, the very first case listed is *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, a decision which has become notoriously productive of difficulty. As is well known, the question, put simply, is whether it is necessary to demonstrate 'ambiguity' in the language of a contract prior to having recourse to evidence of 'surrounding circumstances' as an aid to construction. The question has been made far more difficult than it ought to be, largely in consequence of a string of decisions from the High Court in which recourse to context as a matter of course is alternately embraced and disclaimed (for an overview of the difficulties, see Thomas Prince 'Defending Orthodoxy: Codelfa and Ambiguity' (2015) 89 *ALJ* 491). The fact that the list of cases includes a great number of these conflicting authorities indicates that lower courts are much exercised by the ambiguity in this area. Indeed, the fraught state of the authorities on construction is signalled by the fact that *Western Export Services Inc v Jireh International Pty Ltd* (2011) 282 ALR 604 is included as the 75th most-cited decision, despite it being merely a disposition of a special leave application (and therefore, as the High Court noted in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, binding on no-one). The list of cases assembled by the authors thus lends empirical support to the contention that the law on this point is in urgent need of clarification.

It is necessary to cavil with the approach adopted by the authors in two respects. The first is the somewhat perplexing methodology adopted in order to determine which cases should be included within the scope of the project. The authors explain (p xiii) that they have taken 'a broad view of what constitutes a contract law case, extending it to include several subjects that lie in the periphery of that subject'. The result is the inclusion of a number of authorities which seem distinctly out of place. Examples include *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, which concerns the restitution of money paid under a mistake of law, and *Lipkin Gorman (a Firm) v Karpnale Ltd* [1991] 2 AC 548, on the change of position defence. While it is undoubtedly true that there are great challenges involved in attempting any taxonomy of private law, most would nonetheless say that each of these two decisions belongs not to the law of contract, but to the law of restitution. Of course, since restitutionary claims are often raised in contexts where a contract forms part of the factual matrix, textbooks on the law of contract often include introductory treatments of the law of restitution. Yet this practice on the part of textbook authors is largely driven by the desire to maximise the practicality of the texts. It is not obvious why a similar approach was taken when compiling the cases for this work.

The second reservation concerns the authors' provision of a one-sentence precis of the key proposition to be derived from each decision. Though sometimes helpful, the one-sentence summaries proffered here are, in some instances, a reminder of the hazards inherent in seeking to distil the complexity of judgments in this way. *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, for instance, is said (p 41) to

stand for the proposition that '[t]he principle of privity of contract will not apply where it was the objective intention of the parties to a contract that a non-party should receive some benefit from the contract'. The authors plainly mean to refer to the well-known comments in that decision in respect of the 'trust exception' to privity (see, for example, *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 147–8). Yet the proposition as stated, if taken at face value, is somewhat misleading (for a discussion of the complexities in this area, see Michael Furmston and Gregory Tolhurst, *Privity of Contract*, Oxford University Press, 2015, pp 66–79). In other cases, the proposition provided seems to fail to capture the full significance of a decision. So, for example, the authors state (p 91) that *Shevill v Builders Licensing Board* (1982) 149 CLR 620 stands chiefly for the proposition that 'repudiation of a contract is a serious matter and is not lightly to be inferred by a court'. Though this proposition is undoubtedly sound, and it is certainly one which is affirmed by the court in *Shevill*, it is also the case that *Shevill* is often cited for its relevance to the circumstances in which loss of bargain damages will be available upon termination (see, for example, *Shevill v Builders Licensing Board* (1982) 149 CLR 620 at 627). On other occasions, the one-sentence precis provided is so ambiguously stated as to be of little real use. In summarising *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, for instance, the authors state (p 87) simply that '[i]n some cases, an obligation of reasonableness or good faith may be implied into a contract'.

Despite these two points, this work remains a stimulating and original contribution to the understanding of the Australian law of contract. It has the rare distinction of being a book which repays careful study.

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