Launch of

LEADING CASES IN CONTRACT LAW

by

Daniel Reynolds and Lyndon Goddard

The Hon Acting Justice Arthur Emmett AO QC

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1 Two thousand years ago, the classical Roman poet, Gaius Valerius Catullus, was faced with a dilemma when he wondered to whom he should dedicate his *lepidum novum libellum*, his charming new little book of poems. He chose his friend, Cornelius Nepos, renowned as the earliest writer of biographies in Latin. Catullus dedicated the work to Cornelius because, as he said:

> *Namque tu solebas meas esse aliquid putare nugas*

That is to say: "you have become accustomed to think that my trifles are worth something".

2 When Lyndon Goddard asked me if I would be prepared to launch this charming new little book, *Leading Cases in Contract Law*, I was, of course, delighted to accept the invitation because, with apologies to Catullus:

> Ego solebam tua esse optima putare opera

That is to say, "I have become accustomed to think that your work is of the highest quality".

3 I first came across Lyndon when he was a member of my Roman Law class in 2012. While I had been teaching the subject at Sydney Law School for well over 30 years, 2012 was the first year that I taught the course for the

University of New South Wales. Lyndon topped the class, demonstrating exceptional ability as well as taking a keen interest in the subject. Following his graduation, Lyndon became my last full-time research assistant or tipstaff as they are called in the Supreme Court. As an acting-judge, I no longer have the luxury of my own tipstaff. Lyndon followed a long line of Roman Law students. In my 16 years on the Federal Court, pretty well all of my research assistants, called associates in the federal system, were former Roman Law students. Lyndon lived up to the excellent standards that his predecessors set, to such an extent that he was prepared to stay on as my tipstaff for an extra year, until I achieved statutory senility on top of constitutional senility. Lyndon's ability has been recognised further. He has been awarded the Sir Ninian Stephen Menzies Scholarship in International Law to study for the Degree of Master of Laws at the University of Cambridge. He will be on his way to Cambridge in a matter of weeks. He goes with our very best wishes. I have no doubt that he will excel in his new environment.

4 I do not know Daniel Reynolds quite as well as I know Lyndon. However, I have read some of his work, particularly a recent piece co-authored with Professor George Williams, the Dean of UNSW Law School. Daniel also graduated in law with honours from the University of New South Wales. His ability was recognised by his appointment as tipstaff to Justice Robert McDougall, of the Equity division and Commercial List of the Supreme Court, an exacting master. After ably serving Justice McDougall, he was appointed as associate to Justice Patrick Keane of the High Court. Having been a colleague of Justice Keane's when he was Chief Justice of the Federal Court for my last three years on that Court, I know that Daniel has cleared a very high hurdle.

5 Daniel and Lyndon have now composed a successor to their *Leading Cases in Australian Law*, which was published to great acclaim in June last year. Many of us here tonight were present at the launch by Sir Anthony Mason. With both works, Daniel and Lyndon are loosely following a format established in 1837 with the publication of John William Smith's *A Selection of Leading Cases on Various Branches of the Law*. The last edition of "Smith's Leading

Cases" was published in 1929. The authors of that edition included Alfred Thompson Denning, better known as Lord Denning, Master of the Rolls. Other editors included successive generations of the Chitty family, a name associated with the law of contract ever since the publication of the great treatise on Law of Contract in the late 19th century.

6 Smith addressed his work to the student as well as to the lawyer occupied in actual practice. Smith's object was to guide law students to the leading cases in which they might discover the principles of law of which the students should become thorough masters. Only then could a student trace with accuracy the numerous ramifications into which those principles are expanded in the surrounding multitude of decisions. He suggested that students should know the leading cases, rather than relying on commentaries and the abridgements of the treatise writers, citing Sir Edward Coke's admonition:

> Melius est petere fontes quam sectari rivulos

That is to say, "it is better to seek the source rather than to chase after little streams". That is all very well, of course, if you can understand what the source says. The advantage of following the little streams of the commentators, such as Reynolds and Goddard, is that their learning and insight expose the principle that is sometimes hard to find at the source.

7 Daniel and Lyndon's charming little new book provides a map of the subject to guide both students and practitioners. That was the object of Justinian's Institutes, which Lyndon studied in 2012 in reading Roman Law as part of his law degree. In the 6th century, the Roman Emperor Justinian caused a new text book for law students to be published in Constantinople. He had given instructions for the authors to compose a book of first principles, with the intention of giving law students an elementary framework, a cradle of the law, as he put it, containing the true first principles of all learning in the law.[1] The book was designed to provide a map of the law for practitioners, as well as for

[1] See Proclamation of the Institutes, 21 November 533.

students, and was promulgated as imperial law throughout the then Roman Empire.

8 By focusing on one area of the law, namely, the Law of Contract, Lyndon and Daniel have been able to devote greater energy to the task of explaining and commenting on each case than they were able to do in their first work. Their object has been to give the reader a clear understanding of the principles with which each case is concerned and to show how each case has been applied and developed by subsequent decisions.

9 The work does not aim to be a substitute for a treatise on contract, such as Chitty, and it does not purport to cover every issue that arises under the law of contract. Nevertheless, it is an extraordinarily useful means of gleaning knowledge of, or being reminded of, relevant principles and propositions.

10 The 100 cases summarised in the work have been chosen and ranked by the frequency with which they have been cited in Australian judicial decisions. The authors have adopted a broad view of what constitutes a contract law case. Accordingly, in addition to cases relating to the construction of contracts, implied terms, incorporation of terms, repudiation, certainty and mistake, you will find cases on restitution, relief against forfeiture, unconscionable conduct and damages.

11 In choosing the cases for inclusion, it was necessary to identify those cases that have been frequently cited that are sufficiently connected with the law of contract to warrant inclusion. Many cases may be ranked highly because they have been cited for propositions unconnected with contract, even if they also include important *dicta* on contractual principles. The criteria for choice of a case have been, first, that a contract provided the central factual matrix in which the extracted principle was discussed and, second, that at least one of the propositions for which it is most frequently cited is a principle of contract law.

12 Each of the 100 cases covered in this new work is afforded an entry of two full pages. Each entry follows the same framework. First is the statement of the proposition that Daniel and Lyndon have extracted from the case. For example, the most frequently cited case is *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales*.[2] The proposition extracted is:

> Evidence of surrounding circumstances of the genesis of a contract is admissible to assist in construing a contract, but the inquiry is objective and is not influenced by the parties' subjective intentions.

That is followed by a brief summary of the pertinent facts necessary to explain the extracted proposition, namely, that excavation for tunnels for the Eastern Suburbs Railway was restrained by injunctions because it constituted a nuisance for the inhabitants of exclusive Woollahra. The consequence was that the builder, Codelfa, could not work 24 hours per day 7 days per week as it was required to do under its contract with the State Rail Authority. That led to the frustration of the contract. The question was whether there was a term implied in the contract that the State Rail Authority would indemnify Codelfa in respect of losses suffered by reason of the injunctions.

13 The entry for the case then describes what the High Court held and the key statements made by the Court. That is followed by several paragraphs of commentary by Daniel and Lyndon, with cross-references to later cases and observations about the possible direction of future judicial decisions. Thus, the commentary explains how the "true rule" in *Codelfa Constructions* has been interpreted, giving references to subsequent High Court and Court of Appeal decisions. The commentary for each case is precise and insightful.

14 The genius of the work is the extraction of a single proposition for each of the 100 cases dealt with. Appendix 1 is a table, in alphabetical order, of the cases dealt with, showing opposite each case in the table the single sentence proposition gleaned from that case. Appendix 2 then organises all of the cases dealt with into 10 categories, which cover the principal topics of contract law.

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[2] (1982) 149 CLR 337.

15 Thus, the categories are:

- Terms
- Conditionality
- Construction
- Vitiating Factors
- Enforceability
- Estoppel
- Discharge
- Remedies
- Unjust Enrichment

16 Each category has several sub-categories and some sub-categories have sub-sub categories. For example, the category “Construction” is subdivided into:

- Principle of objectivity
- Extrinsic material
- Commercial contracts
- Evidence of negotiations
- Post-contractual negotiations
- Unjustness or absurdity

- Exclusion and limitation clauses

- Contracts of guarantee or indemnity

17 Thus, *Codelfa Constructions Pty Ltd v State Rail Authority* appears under the heading "Extrinsic Material", which is a sub-heading of "Construction". The judgement exercised in the categorisation and classification of each case demonstrates a high level of analysis and understanding of the cases.

18 Appendix 3 is not concerned with the 100 most frequently cited cases but with the cases that might end up in such a list in years to come. It is a list of cases that have been decided in the past five years and have since been cited at such a rate that, if they had been decided earlier, they may well have been included in the top 100 cases.

19 Apart from reminding me of the high standard of assistance that Lyndon afforded to me during his time as my tipstaff on the Court of Appeal, the work has considerable personal interest in two respects. First, the cases in the list that are more than 20 years old sparked memories of my time at the Bar preparing submissions, particularly in the Commercial List and the Equity Division and on appeal to the Court of Appeal, as well as, although not to the same extent, proceedings in the Federal Court. It would have been a great boon to have a checklist such as Appendix 2 in order to identify quickly the appropriate authority for propositions on which I wanted to rely.

20 The second matter of personal interest concerns those few cases in which I have been personally involved. I hasten to say that none of the cases involves a decision of mine, although one of the cases is an example of an occasion when the High Court made a mistake in dealing with an appeal from the Federal Court.[3]

[3] *Roxborough v Rothmans of Pall Mall Australia Limited* (2001) 208 CLR 516.

21 Case No 15, *David Securities Pty Limited v Commonwealth Bank of Australia*,[4] is an instance of judicial legislation by the High Court at the expense of the party for whom I appeared. The proposition extracted by Daniel and Lyndon is:

> Where a defendant is enriched by a plaintiff's mistake, whether the mistake was one of fact or law, restitution will be available unless the defendant can show that it would be inequitable in all the circumstances to require restitution.

The conclusion that there is no distinction in the Common Law between mistake of fact and mistake of law, a distinction that had existed in Roman Law and was thought for centuries to exist in the Common Law, involved the overturning of many authorities and is now a well-established principle. The High Court was so anxious to find a vehicle for judicial legislation to establish that principle that it chose a case where there had been no finding of mistake by the trial judge or by the Full Court. Indeed, no mistake had been pleaded. The matter was remitted to the Federal Court for further hearing but the claimants abandoned their claim before any further hearing could take place. Thus, the principle was established in much the same circumstances in which Lord Atkin messed up the law of negligence: there may never have been a snail in the ginger beer.[5]

22 Case No 51 is *Ankar Pty Ltd v National Westminster Finance*,[6] in which the guarantor for whom I appeared was successful The proposition extracted by Daniel and Lyndon is:

> For a contract of guarantee, the liability of the guarantor is to be construed in the strictest possible way.

23 That is to say, in a contract of guarantee, the liability of the guarantor is to be construed *strictissimi iuris*, a principle that can be traced back to Roman Law. No judicial legislation was involved in that case. However, when the matter

[4] (1992) 175 CLR 353.
[5] *Donoghue v Stevenson* [1932] AC 562.
[6] (1987) 162 CLR 549.

was remitted to the Supreme Court, the guarantor was found to be liable on a different basis, so the victory in the High Court was somewhat Pyrrhic.

24 None of the cases dealt with by John Smith in his “Leading Cases” is among the 100 cases extracted by Daniel and Lyndon, no doubt by reason of the passage of time. The tradition of publishing a collection of leading cases was followed in 1938, but in a somewhat less sombre vein. AP Herbert’s *Uncommon Law: Being 66 Misleading Cases* summarises cases in which, for the most part, Mr Albert Haddock is the principal litigant either as plaintiff, defendant or accused. AP Herbert’s cases are all fictional, but, for the most part, they show up idiosyncratic consequences that can flow from the application of genuine principles in particular circumstances. Sadly, none of AP Herbert’s “Misleading Cases” has made it into the list either, notwithstanding that an introduction to “Misleading Cases” was written by Lord Atkin of snail fame.

25 I congratulate Daniel and Lyndon on the production of this *lepidum novum libellum*, their charming new little book, a work of very high intellect but also of extremely practical utility. They are to be congratulated the work, as are their publishers, The Federation Press. I have great pleasure in launching *Leading Cases in Contract Law*. I commend it to you all.