Landmark Cases in the Law of Contract BY CHARLES MITCHELL AND PAUL MITCHELL, eds. [Oxford: Hart Publishing, 2008. 373 pp. Hardcover: £40]

This is a collection of twelve original essays which stem from papers presented at a symposium held in King's College London. Similar to publications of this nature, *Landmark Cases in the Law of Contract* discloses no explicitly obvious theme throughout its chapters; even the criterion of "landmark" is an apparent misnomer, for the selection of some of the cases is based not on their affirmative significance, but rather that these cases should lose their "landmark" status. To be sure, if the sole factor determinative of whether a case is "landmark" were the frequency by which it appears in a student's textbook, then the selection of familiar cases such as *Hochster v. De La Tour* (1853) 2 E. & B. 678, *Taylor v. Caldwell* (1863) 3 B. & S. 826, *Smith v. Hughes* (1871) L.R. 6 Q.B. 597, *Foakes v. Beer* (1884) 9 App. Cas. 605, *Hongkong Fir Shipping Co v. Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26, *Suisse Atlantique Societe d'Armament SA v. NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, *Rearden Smith Lines Ltd. v. Yngvar Hansen Tangan* [1976] 1 W.L.R. 989 and *Johnson v. Agnew* [1980] A.C. 367 would not seem out of place. Yet, if one were to adopt the same benchmark, the selection of cases like *Coggs v. Barnard* (1703) 2 Lord Raym 909, *Pillans v. Van Mierop* (1765) 3 Burr. 1663, *Carter v. Boehm* (1766) 3 Burr. 1905 and *Da Costa v. Jones* (1778) 2 Cowp. 729 might seem rather unusual. However, such a view of what a "landmark case" means would be unduly narrow, and it is quite clear that the authors of the present volume would not be constrained by a conventional understanding of the term. The result is twelve essays of two main types. Whilst all discuss the legal significance (or insignificance) of the selected cases to some degree, some essays focus more on the cases' historical background, with the occasional excursus to the life of the judge who decided the case. Others discuss the historical background only as much as is necessary to discuss the legal aspects of the selected case.

The essays by Dr. Stephen Watterson, Dr. Warren Swain and Ms. Catherine MacMillan are of the former type. Dr. Watterson's essay on *Carter v. Boehm* contains

a most entertaining (and no doubt painstakingly researched) account of the historical background leading up to the decision itself. Such an extended sojourn into the lives of the litigants, as well as the historical backdrop, brings to life the bare proposition which the case is traditionally thought to stand for—that an insurance policy can be avoided on the ground of non-disclosure of facts material to the risk undertaken by the insurer but the insured need not disclose facts which both parties have equal means of knowing or are merely general topics of speculation. Dr. Swain's piece on *Da Costa v. Jones* provides an exceptionally enlivening account of how wagers on the gender of the Frenchman Chevalier d'Eon brought about judicial disenchantment with enforcing wagers. D'Eon was definitely ascertained to be male after his death. Ms. MacMillan's essay on *Taylor v. Caldwell* is also of equal interest as the two former pieces. The author—described as "the leading 'legal archaeologist' of English law" after Professor A.W.B. Simpson (David Campbell, "Book Review: *Landmark Cases in the Law of Contract*" (2009) 30 Journal of Legal History 107 at 108)—is of course well known for various essays steeped in legal history (for instance, a series on the law of mistake) and this piece on the counterpart to mistake—frustration—lives up to the author's reputation. The reader is brought through the construction, triumphant utilisation and then destruction of the Surrey Music Hall before a short legal discussion of the doctrine of frustration. Again, the contribution here is to personify the otherwise bare citation of facts in the law reports of *Taylor v. Caldwell* rather than to discuss the legal significance of the case at length. But these three essays are nonetheless excellent contributions to the present volume.

Professor David Ibbetson's chapter on *Coggs v. Barnard* is representative of the latter type of essay which focuses more on the legal aspects of the selected case. Thus, after a masterly (but comparatively shorter) survey of the historical context of the case, there is a learned examination of the present significance of the case in the law of bailment. Whilst Professor Ibbetson makes no apologies about the inclusion of *Coggs v. Barnard* as a landmark case in the law of *contract*, this perhaps ignores the contrary view (best expressed by Lord Denning M.R. in *Building and Civil Engineering Holiday Scheme Management Ltd. v. Post Office* [1966] 1 Q.B. 247 at 260–261) that an action against a bailee can often be put as an action on its own (for it is *sui generis*), rather than as an action in contract or tort. By this view, the requirement (and finding) of consideration is but a misleading inference drawn from the fortuitous association of bailment with the writ of assumpsit for procedural convenience. The broader illustration from this is the artificiality caused by a fundamentalist adherence to the requirement of consideration as a substantive formative element of a contract.

Professor Gerard McMeel's chapter on *Pillans v. Van Mierop*—which stands as authority for the (discarded) view that consideration served only the evidential function of showing an intention to be bound and can be waived when the contract was in writing—takes up this issue. Professor McMeel's argument that consideration fundamentalism is eschewed where commercial necessity demands it has a ring of truth to it, although it will take a lot to extract such a confession from an English (or Singaporean) judge. Ever since the aforementioned proposition in *Pillans v. Van Mierop* was decisively rejected in *Rann v. Hughes* (1778) 7 T.R. 350n, consideration has been treated in English law as an immutable requirement for the formation of contracts not made in a deed. Indeed, departures from the formal necessity of

consideration have mainly been cast in the language of exceptions rather than the outright jettisoning of the requirement generally.

The problems associated with consideration continue to be explored in the present volume by Professor Michael Lobban's chapter on *Foakes v. Beer*, which, when read with *Williams v. Roffey Bros* [1991] 1 Q.B. 1, represents the bane in many law students' minds. The decision of the English Court of Appeal in *Collier v. P & MJ Wright (Holdings) Ltd.* [2008] 1 W.L.R. 643 came too late to be considered in the chapter, but Professor Lobban would surely have disagreed with the arguable substitution of promissory estoppel for consideration in that case, judging from his view that both *Williams v. Roffey Bros* and the doctrine of promissory estoppel developed in *Central London Property Trust Ltd. v. High Trees House Ltd.* [1947] K.B. 130 must be seen as "problematic".

Apart from the highly entertaining historical material in these three essays, the discussions of *Pillans v. Van Mierop*, *Foakes v. Beer* and, to a lesser extent, *Coggs v. Barnard*, provide valuable food for thought in relation to the doctrine of consideration. Lest it be thought that these cases decided some two centuries ago are no longer relevant in modern day Singapore, the Court of Appeal's recent decision in *Gay Choon Ing v. Loh Sze Ti Terence Peter* [2009] SGCA 3 shows that the Singapore courts may be willing to reconsider consideration here. Such a willingness had already been demonstrated in High Court decisions such as *Chwee Kin Keong v. Digilandmall.com Pte. Ltd.* [2004] 2 S.L.R. 594 (at para. 139) and *Sunny Metal & Engineering Pte. Ltd. v. Ng Khim Ming Eric* [2007] 1 S.L.R. 853 (at paras. 28–30) but this latest indication by Singapore's highest court (albeit by dicta in a coda to the judgment) must surely bring renewed relevance to discussions of the sort in the present volume. Indeed, whilst the Court of Appeal ultimately settled on the status quo of retaining consideration, it made little secret (at para. 118) that this was seen to be an uncomfortable compromise and that a re-evaluation might well be on the cards at another time.

Dr. Paul Mitchell, Professor Charles Mitchell, Mr. Donal Nolan and Professor Roger Brownsword discuss various issues relating to breach in four essays. Dr. Mitchell deals with *Hochster v. De La Tour* and the vexed problem of anticipatory breach. Following a prolonged (but interesting) exposition of the common law relating to the legal consequences of parties jeopardising the future and actual performance of a contract prior to *Hochster v. De La Tour*, Dr. Mitchell very clearly explains how that case interpreted the existing law innovatively to arrive at the presently familiar consequences resulting from an anticipatory breach. Professor Mitchell's piece on *Johnson v. Agnew* may very well be regarded as a companion piece.

Moving on somewhat from the damages resulting from breach, Mr. Nolan's piece on *Hongkong Fir Shipping Co v. Kawasaki Kisen Kaisha Ltd.* is an important contribution to the renewed debate on the viability of classifying contractual terms into the tripartite categories of conditions, warranties and intermediate terms. Mr. Nolan concludes, after examining how our current understanding of the *Hongkong Fir* case is somewhat mistaken, that the intermediate term (which was re-conceptualised and implicitly introduced in the *Hongkong Fir* case) brought together the "condition/warranty" approach and the "seriousness of event resulting from breach" approach. This conclusion is similar with that reached by the Court of Appeal in *RDC Concrete Pte. Ltd. v. Sato Kogyo (S) Pte. Ltd.* [2007] 4 S.L.R. 413, where the

issue of integrating these two approaches was considered closely. Whilst the Court of Appeal evidently held that even if the parties had intended a term to be a warranty, that ought still to be subject to the "seriousness of event resulting from breach" approach, Mr. Nolan's view that the parties' right to make any term a "warranty" (with its consequent effects) as the logical corollary to their right to make any term a condition is an interesting counterpoint (see now, however, the Court of Appeal's very recent decision in *Sports Connection Pte. Ltd. v. Deuter Sports GmbH* [2009] SGCA 22, in which the court largely reaffirmed its approach in relation to discharge by breach in *RDC Concrete Pte. Ltd. v. Sato Kogyo (S) Pte. Ltd.*). Professor Brownsword's piece on *Suisse Atlantique Societe d'Armament SA v. NV Rotterdamsche Kolen Centrale*—traditionally understood as an important case in the (somewhat outdated) law relating to fundamental breach—contains an interesting suggestion that the House of Lords in that case failed to address the broader question of whether contract law is geared towards cooperation and trust or for self-reliance and defensive dealing. It is possible to see the classical rhetoric by the House of Lords in the *Suisse Atlantique* case on the freedom of contract as masking a judicially-instigated protective approach under the guise of contractual interpretation—as Professor Brownsword in fact argues in *Contract Law: Themes for the Twenty-First Century*, 2nd ed. (Oxford: Oxford University Press, 2006) at 60—and this particular piece stands out in the present volume for engaging the deeper assumptions relating to the law of contract.

The two remaining essays are difficult to fit within any preconceived category, but that alone certainly does not militate against the quality of these contributions. Professor John Phillips' piece on *Smith v. Hughes* contains an innovative suggestion that the law of unilateral mistake should be explained on the basis of unconscionability rather than the absence of *consensus ad idem*, as is commonly understood to be the case. This fundamentally changes the understanding of unilateral mistake because whilst conventional understanding negates the existence of any contract, the suggestion by Professor Phillips arguably presupposes the existence of a contract. The greater challenge is, of course, to the viability of mistake as an independent doctrine but Professor Phillips does not really address the consequence of his argument with respect to unilateral mistake on other types of mistake (although he does acknowledge the need). The significant obstacle to Professor Phillips' suggestion is the almost routine acknowledgement of an independent doctrine of common mistake by Lord Phillips M.R.—coincidentally Professor Phillips' namesake—in *Great Peace Shipping Limited v. Tsavliris (International) Limited* [2003] Q.B. 679. A possible way is to treat common mistake as akin to frustration (and hence a wholly separate doctrine), whilst treating unilateral and mutual mistakes as conceptually different creatures. However, there evidently was no space to refine the argument fully and we are left with the assertion that the unifying feature should be unconscionability. Finally, Professor Michael Bridge's essay on *Rearden Smith Lines Ltd. v. Yngvar Hansen Tangan* on section 13 of the *Sale of Goods Act* and its present-day irrelevance makes for a compelling read.

In summary, *Landmark Cases in the Law of Contract* is a worthwhile collection of essays to have in any library, private or public. One may quibble with the lack of a list of cases or an index—for the inclusion of both or either would surely unearth the many riches of painstaking research more easily—but the present volume more than overcomes such shortcomings with the high quality of its contributions. The earlier

mentioned lack of an explicitly coherent theme may likewise operate as an advantage: one is kept in suspense over the nature of the essay about to be encountered, and the delightful spread ranges from the historical to the doctrinal to the theoretical—more than enough to satisfy anyone interested in the law of contract generally or specifically.

GOH YIHAN
National University of Singapore