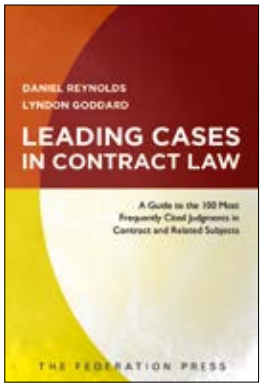
Leading Cases in Contract Law

By Daniel Reynolds and Lyndon Goddard | The Federation Press | 2017



This work is the sibling of the authors' previous publication, *Leading Cases in Australian Law*. It presents a collection of the 100 most frequently cited judgments in contract law and allied concepts (such as restitution and estoppel) each accompanied by a statement of principle and a short note. It belongs to a genre of legal work with considerable legacy by reference to the popularity in its time of the 13 editions of Smith's *Leading Cases on Various Branches of the Law with Notes* (1837 to 1929).

One could not find a better summary of principle or place in law of any of the featured cases in this work. The statements of principle range from the straightforward (*Hoyt's Pty Ltd v Spencer* (1919) 27 CLR 133, 'A collateral contract is enforceable if it is consistent with the main contract') to the nuanced (*Koompahtoo Local Aboriginal Land Council v Sanpine* (2007) 233 CLR 115, in relation to intermediate terms); they are all succinct and, in the view of the reviewer, accurate. The case notes are divided into a statement of facts; the determination of the Court, or the *relevant* determination where the case deals with aspects of law outside contract; a collection of commonly cited passages; and the author's commentary on the decision and its place in relation to the other cases featured. The authors manage this task in two pages for each judgment.

Leading Cases in Contract is accompanied by an appendix containing, in alphabetical order, each of the cases attached to the applicable one-sentence proposition of law. The appendix alone justifies its position in the chambers of any commercial barrister or, even better, within easy reach on the bar table.

These estimable practical features should not obscure the startling experience of reading *Leading Cases in Contract* cover to cover. Like *Leading Cases in Australian Law,* it applies what the authors describe as a 'mechanistic' methodology to assembling a compilation of 100 cases. This involves a strict organisation by order of the frequency of citation in later decisions, determined with the assistance of LexisNexis Australia. Differing from any of its predecessors, it is not a generalist work but contained to a defined field of law. The absence of curation results in the persistent themes of contract rising and falling with an unpredictable tempo. The effect, read through, is something akin to seeking an understanding of the evolution of dinosaurs by reference to exhibits at the Australian Museum ordered by popularity. To take the most apparent example, notable and not always consistent authorities dealing with aspects of construction appear in the first half of the work at #1 (*Codelfa*), #3 (*Toll*), #5 (*BP Refinery*), #12 (*Pacific Carriers*), #29 (*McCann*), #39 (*Woodside*) and #43 (*Maggbury*). Despite the best efforts of the authors in reconciling and cross-referencing these cases in their commentary, the result is disorienting.

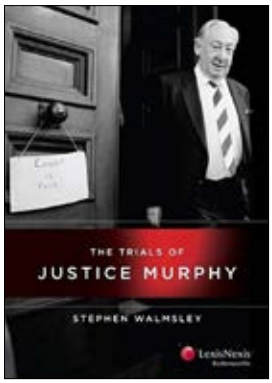
Nonetheless, approaching the work in this way offers for those reasonably acquainted with the field a refreshing insight into the controversies that have animated contract law in Australia. Even the most jaded reader might find awakened a long-dormant desire to discuss with any unfortunate colleagues in reach the historically, if not recently, vexed questions of ambiguity and estoppel. This peculiar aspect, and the value of *Leading Cases in Contract* as a reference work, make it a valuable addition to the contractual corpus.

Reviewed by Alexander H Edwards

The Trials of Justice Murphy

By Stephen Walmsley | LexisNexis Butterworths | 2016

Despite competition from other states, New South Wales remains home to Australia's greatest judicial controversy: the allegation that a justice of the High Court, Lionel Keith Murphy, twice attempted to pervert the judicial power of the Commonwealth. This controversy is the subject of Stephen Walmsley's excellent book, *The Trials of Justice Murphy*.



In late 1984, Murphy, then a sitting High Court judge and a former Senator and federal attorney-general, was charged with two counts of attempting to pervert the course of justice. In one count, the prosecution alleged that in early 1982 he attempted to induce NSW Chief Magistrate Briese to intervene in committal proceedings in respect of forgery and conspiracy to forge charges laid against a solicitor, Morgan Ryan, that were before another magistrate. It was alleged that Murphy had a close association with Ryan and that he had cultivated Briese by telling Briese that he would advance the cause of independence for NSW magistrates with the state government. Murphy was accused of suggesting that Briese return this favour by helping Ryan when he spoke to Briese in January 1982, saying 'And now, what about my little mate?' Murphy consistently denied that he was as close to Ryan as suggested by the prosecution. He said that it was Briese who lobbied him about guarantees of independence for magistrates and that it was Briese who first mentioned Ryan's case, not him. He denied he said those famous words (or ever used the word 'mate') or made any request of Briese about the Ryan case.

The other charge against Murphy was that he attempted to influence District Court Judge Paul Flannery who was to preside over Ryan's trial. The prosecution alleged that Murphy also cultivated Flannery and that, during a dinner on the Saturday night before Ryan's trial, Murphy implicitly suggested that Flannery should help Ryan when he complained to Flannery about the practice of prosecutors laying conspiracy charges when a substantive offence was available (as had supposedly occurred in Ryan's case). Flannery said Murphy referred to a recent High Court decision on that topic (*R v Hoar* (1981) 148 CLR 32). Ryan's trial was not mentioned at the dinner. Murphy denied that he cultivated Flannery, denied that he knew Flannery was the trial judge for Ryan, and said that it was Flannery who introduced the general subject of conspiracy charges at dinner.

(Spoiler alert.) At his first trial in 1985, Murphy was acquitted of the Flannery charge but convicted of the Briese charge. On appeal, he secured a retrial (*R v Murphy* (1985) 4 NSWLR 42). He was acquitted of the Briese count in April 1986. Murphy died of cancer six months later. In the meantime, a dispute had broken out over his entitlement to return to sit at the High Court. An inquiry into his conduct was commenced and then wound up while in its infancy. What became of that is now publicly available.

Murphy's two trials are the focus of Walmsley's book but they are only the middle chapters of a saga that the author lays out in a page-turner that begins with a dinner in 1979 attended by Briese, Ryan, Murphy, the Police Commissioner and Briese's pre-

decessor as Chief Magistrate, who was later convicted of corruption. Walmsley follows the story from the dinner which coincided with an illegal phone tapping operation that focussed on Ryan, and traces it through the two Senate inquiries that preceded the trial. And as legal sagas go, this one had everything: high political scandal, underworld figures, a prosecutor who later sat on the High Court with two of Murphy's character witnesses, a premier convicted of contempt, some complex points of law, an interview with the foreman of the first jury on talkback radio which revealed the jury's deliberations, references to a judge's sexual drive, a who's who of the best advocates of the 1980s, a misconstrued suggestion that the High Court would go on strike, and eight Supreme Court judges who were involved in the trials and appeal writing to a Crown witness (Briese) to assure him that Murphy's acquittal did not warrant any action being taken against him as had been suggested by the premier.

... as legal sagas go, this one had everything: high political scandal, underworld figures, a prosecutor who later sat on the High Court with two of Murphy's character witnesses...

One revelation from the book is the doozy of a question posed by the jury to the trial judge at Murphy's first trial, namely that '[w]e have no evidence concerning the probity, legality or otherwise of whether or not a Judge, High Court or otherwise, is permitted to discuss current matters before another judge with that other judge. Please comment'. This question went to the heart of this tale, and it is perhaps its only continuing relevance. How this question was dealt with at the trial and the ensuing debate about whether that involved a misunderstanding of the question are well covered in the book. But it is a topic that warrants serious thought and I would have been interested to read the author's view on the jury's question. (After judgment has been delivered, the following conversation often takes place between judges. Judge 1: 'Have you read my [implicitly fabulous] judgment in [totally forgettable case]? Judge 2: 'No'.)

Does the Murphy family have their own 'untold story' that never came out?

Not surprisingly, Walmsley's coverage of the trials is the strongest part of the book. Drawing on the original sources and having spoken to many of the players, he explains the course of the trials and the tactics in a style that is accessible for practitioners and non-practitioners alike. We learn that Ian Barker QC, who appeared for Murphy at the second trial, banned trolleys, folders and documents from the courtroom. No frills. Unlike the first trial, the defence case in the second trial was over in two hours: Murphy gave a short dock statement, there was some brief evidence from his secretary and no character witnesses. The focus was left firmly on the Crown case. Walmsley also refers to a wide array of press commentaries to paint the atmosphere in the courtroom during the trial, even allowing for the fact that a number of them had skin in the game. From that, the prosecutor (Ian Callinan QC) emerges as someone to avoid being cross-examined by.

My only grumble with the book is the perspective of the chapters that precede the first trial. The author tells us early on that he is Flannery's son-in-law and he admired Briese as a whistle-blower. Still, these chapters take it from their perspective, so we start by thinking that Murphy did it and then we learn how he beat the charges. Whole chapters are devoted to Briese and Flannery respectively. Mini-portraits of their personalities are littered throughout the book. Murphy only exists through his actions. Walmsley tells that when Flannery was thinking of speaking up, he was in a 'moral dilemma' and concludes that '[u]ltimately [Flannery] chose the truth'. In this search for truth, we are told no less than three times that Flannery's son received a call in Sydney from Murphy seeking his father's contact details at a hotel in Brisbane, even though this was never adduced in evidence at the trial. The author tells us that Flannery did not want his son called as a witness. What are we to make of this apparently 'new evidence'? Was it investigated or tested? Does the Murphy family have their own 'untold story' that never came out?

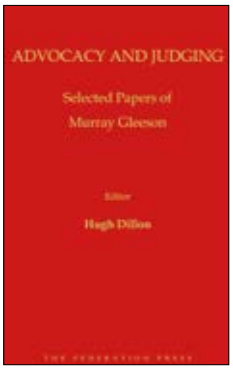
In the end, we learn a lot about what happened to Murphy but not much about who he really was. Despite all that has been written about Murphy including this excellent book, he remains elusive. A realistic assessment of Murphy appears stuck in the no-man's land between, on the one hand, the odd combination of (once) radical journalists whose certitude that he was a crook never waivers and those who despised Murphy and anything he stood for, and tribal warriors who have canonised the avowedly atheistic Murphy on the other. The scenario that Murphy was a gregarious but undisciplined personality who simply would not stop talking about current cases that were before a judge but did not intend to nobble them appears to have been a case theory that no one had an interest in running or writing about. [1]

Read the book over summer. Make your own mind up, or maybe just let the jury verdicts stand.

Reviewed by Robert Beech-Jones

Advocacy and Judging: Selected Papers of Murray Gleeson

Hugh Dillon (Ed) | The Federation Press | 2017



This work contains 33 papers authored by the Honourable Murray Gleeson AC during the period 1979 to 2015, covering a range of legal topics relevant to the practice of barristers and Australian law more generally.

As the title of the compilation suggests, many of the papers principally focus upon aspects of advocacy or the role and work of judges. These papers address topics such as the function and method of advocacy, cross-examination, judicial method, judicial selection and training, the nature of the judiciary, qualities necessary for judicial activity, the impact of the Constitution and legislation upon such activity and the importance of public confidence in the judiciary.

Aside from those papers that address those subjects as their principal focus, all of the selected papers address topics fundamental to the work of barristers and judges. The rule of law and the nature of the adversarial system are constant undercurrents in most of the papers. This selection includes papers on fundamental principles of the common law, such as legality, finality and legitimacy, and in relation to the criminal justice system, the presumption of innocence. Several papers address matters which are intrinsic to the work of lawyers and judges, such as legal interpretation and contractual interpretation. These papers provide a thorough foundation in an easily digestible format for those principles, the legal reception of which can often be assumed and therefore taken for granted. These works contain a valuable exposition of the basis of such principles.

Many of the papers consider aspects of constitutional law and several take the Constitution as their principal focus, including one on the constitutional decisions of the Founding Fathers, and another on section 74 of the Constitution, which prohibits appeals to the Privy Council from the High Court on constitutional matters. Other