VANISHING CONTRACT LAW: COMMON LAW IN THE AGE OF CONTRACTS

C Mitchell, **Vanishing Contract Law: Common Law in the Age of Contracts**, Cambridge: Cambridge University Press, 2022, 259 pp, hb £85.00

To those engaged in the study or practice of contract law, the idea that 'contract law, and the judicially created common law in particular, is disappearing' (p. 1) will be surprising. After all, in recent years a number of important contract law cases have made their way through the appellate courts (*Barton v Morris* [2023] UKSC 3 on implied terms and restitution; *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2021] UKSC 40 on lawful act duress; *FSHC Group Holdings Limited v Glas Trust Corporation Ltd* [2019] EWCA Civ 1361 on rectification for common mistake; and *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20 on negotiating damages, to name a few). But the claim made by Professor Catherine Mitchell in her fascinating new book, *Vanishing Contract Law: Common Law in the Age of Contracts*, is not that the common law of contract is 'disappearing' in a literal sense; it is that its role, particularly in non-commercial cases, has 'diminished'. Mitchell argues that where the common law could be playing, and perhaps once did play, a role as a general regulator of contract law, addressing the social effects of contracting and responding to issues such as inequality of bargaining power and other market failures, it has instead, under the banner of 'freedom of contract', chosen to take on a much more limited role. The book's thesis is that there has been an increased focus on identifying and enforcing the express or implied terms of parties' agreements, to the exclusion of the development of the substantive common law of contract in any area other than the law in relation to express or implied terms.

This is a consequence, Mitchell argues, of a 'classical' or 'formalist' approach to contract law. According to this approach, provided the agreement was concluded in the absence of any vitiating factors (misrepresentation, duress, undue influence, and exploitation of weakness), the role of the courts is simply to enforce the parties' agreement as made. Policy questions that might arise as to certain contracting practices—that is questions not directed to establishing the rights of the parties inter se—are the domain of Parliament, not the courts. The book aims to consider the implications of this approach and whether there is any possibility of the common law taking on a more substantive role. It is well written and engaging, and it merits reading by those teaching or researching the law of contract.

Chapters 2 and 3 of the book are devoted to the 'diminishment claim'—the claim that the common law of contract has taken on a less regulatory role. Chapter 2 reviews the history of contract law in order to argue that it was only in recent memory (principally the 1970s and 1980s) that judges had been willing to 'respond to social welfare concerns raised by weaker parties transacting in the market' and to recognise that 'policy goals could be pursued through [the common] law' (p. 26). This is contrasted with the modern law's approach, which, as noted above, takes as its starting point that the role of contract law is not to pursue broader policy goals but simply to enforce the parties' agreement as made.

Examples of judges supposedly taking a less 'formalist' approach to contract law are given (p. 35). Thus Mitchell points to the courts' willingness to recognise that labels in the contract (such as describing a term as a 'condition') may not accurately describe the substantive rights of the parties (*L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235), the recognition of a doctrine of economic duress (*North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705), and the recognition of a doctrine of promissory estoppel (*Central London Property Trust ltd v High Trees House Ltd* [1947] KB 130), permitting a court to take 'a more just and fair approach' (p. 36). However, Mitchell observes that if these developments were indicative of a trend to focus on contractual fairness—which may be doubted—any further development was soon given a short shrift (referring to the rejection of a general doctrine of 'inequality of bargaining power' in *National Westminster Bank plc v Morgan* [1985] AC 686, 708) (p. 36). A key reason identified for the shift (back) to a 'formalist' approach to contract law is the rise of specific legislation and regulation dealing with market failures and, in particular, regulation dealing with consumers (p. 46). Mitchell argues that this placed English law on a specific path in which the common law jettisoned any concern about inequality of bargaining power or market abuses, this being a matter better left to Parliament (p. 44).

These points are all well made. One small point of criticism though is that in making the claim that the common law of contract did at one point concern itself with broader welfare concerns, Mitchell places particular emphasis on the role of equity, lamenting that equity has since been 'marginalised' due to its association with judicial discretion and concerns about equity's intrusion into commercial matters (p. 29–31). Indeed, the book refers to an 'anti-equity mindset' that has resulted in 'values of certainty and predictability … eclips[ing] those of justice or fairness traditionally associated with equity' (p. 52). But the idea that, 150 years after the Judicature Acts, a judge sitting in the High Court exercising both common law and equitable jurisdiction is concerned with 'justice or fairness' only when dealing with equity, but not when dealing with the common law, can be quickly dismissed. What the author really seems to be

advocating for is a greater use of a 'contextual (standards-based) style of legal reasoning' (p. 35), that is a reliance on broad principles, such as 'unconscionability' and 'good faith', rather than on concrete rules. But as recent changes to the common law on illegality (*Patel v Mirza* [2017] AC 467)—on which the author relies elsewhere in the book—have shown, this has nothing to do with 'common law' versus 'equity' but is simply a question of judicial method.

Chapter 3 seeks to make good the claim that the modern law has seen a return to freedom of contract at the expense of the common law's potential to act as a general regulator of contracts. Several contributors to this trend are identified. First is the primacy of contractual interpretation, which 'has become a much more important source of contract disputes and judicial decision-making than almost any other part of contract law' (p. 56). This has had the consequence that judges have avoided doctrinal developments in areas other than those relating to the enforcement of express or implied terms—enforcement of the parties' agreement has taken centre stage. An example given is *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24, where the Supreme Court avoided having to discuss the 'practical benefit' doctrine in the law of consideration and whether it applied to part-payment of a debt by ruling instead on the validity of a 'no oral modification' clause (p. 57). Second is the aversion of courts to considering policy arguments in contract matters, the result of which is that courts are reluctant to determine the limits of freedom of contract or to check self-interested behaviour (pp. 58–60). Third, Mitchell expands on the claim that there has been a marginalisation of equity, except where it serves to uphold the terms of the contract, so that concepts such as 'good conscience' and 'fairness', which might have imposed a restriction on 'freedom of contract', now have a very limited role to play (pp. 60–67). Finally, Mitchell argues that there is a tendency for courts to operate on the assumption that there is a common law of 'contract', not 'contracts', and thus not to differentiate between 'different types of contracting party' (p. 67). The effect of this is that courts have often interpreted consumer protection provisions in a way so as to align with the approach taken to commercial contracts—eg by focusing on party autonomy—frustrating the consumer protection purpose of the legislation in the process (pp. 67–72).

Whereas Chapter 3 examines the ways in which courts have contributed to a 'diminished' common law of contract, Chapter 4 looks at the contribution to this state of affairs made by (i) private arrangements, that operate as an alternative to common law rules or enforcement, such as tailored rules and dispute resolution procedures put forward by global trading associations, and (ii) market-specific regulation and regulators, like the Financial Conduct Authority and the Competition and Markets Authority. To give an example of the former, Mitchell discusses the International Swaps and Derivatives

Association Master Agreement, which is widely used to govern over-the-counter derivatives trading transactions. Mitchell shows how courts, due to the Master Agreement being widely relied upon, have often refrained from intervening in its operation. Instead, the focus has been on interpreting and enforcing its express and implied terms in a way that ensures 'clarity, certainty, and predictability' (*Lomas v JFB Firth Rixson Inc* [2010] EWHC 3372 (Ch) at [53]) (p. 93). As for the latter, Mitchell argues that the increasing use of regulation has led to the common law of contract simply having less to do and not considering the ways in which policy goals could be pursued through the common law rather than simply being left to regulation (p. 114).

At this point in the book, a so-called formalist might ask why any of this is a bad thing. On one view, questions of policy are simply not relevant to determining the substantive rights of the parties inter se—although they might be relevant at the stage of seeking a court order, at which point state power is involved, thus engaging 'broader social and economic considerations' (*Cavendish Square Holding BV v Makdessi* [2015] UKSC 67 [29]). Courts are in the business of adjudicating on substantive rights, not promoting policy objectives. Moreover, if the rise of protective legislation for consumers means there is less work for the common law to do, then there is simply no warrant or need to distort common law principles in order to achieve these aims. Specific market failures can, and should, be addressed by regulation.

Chapter 5 anticipates this argument by identifying cases where the common law could still usefully serve a role as a 'general regulator of contracts' (p. 115). This is in addition to a brief response to this question that appears earlier in the book (pp. 6–9). One such case discussed is *MWB* which, as noted above, concerned the application of the 'practical benefit' doctrine to the part payment of a debt. Had this issue been resolved in the Supreme Court, it would have had significant ramifications for the 'approximately eight million people in the United Kingdom [who] struggle with debt' and potentially have permitted debtors and creditors to make informal compromises that are legally binding and enforceable (p. 117). On the present state of the law, such informal debt arrangements do not preclude a creditor from seeking to enforce the debt in full.

But by Mitchell's own admission, 'the likelihood of disputes over these matters reaching senior courts is vanishingly remote' (p. 144). There is therefore a question whether, even accepting all the author's claims so far, anything can be done about the contract problems identified in Chapter 5. One argument is that if these issues merited sufficient attention, they could be dealt with by careful legislation, perhaps prompted by the Law Commission. But that is not the argument being put forward. The book is about the role of the common law of contract.

Before considering the possibility of a 'common law revival' in Chapter 7, Chapter 6 outlines some of the 'future pressures on contract law that are likely to reinforce its formalist and commercialist tendencies' (p. 146). These include: (i) the incentive of courts to sell English law as a product in order to attract commercial litigants to English courts (pp. 147–152); (ii) the rise of alternative dispute resolution, which does not contribute to the development of the common law (pp. 152–160); and (iii) increasing contract automation (pp. 160–174).

Chapter 7 then suggests three areas in which judicial development of the common law away from the 'formalist' model of contract law might be possible. The first is the recent engagement with the idea of a 'relational contract' in cases such as *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 11 and *Bates v The Post Office (No 3)* [2019] EWHC 606 (QB) and associated 'other-regarding' ideas such as good faith and loyalty, which would point towards a less self-interested model of contract law. The second encompasses developments overseas, such as the role of 'unconscionability' in the decision of the Supreme Court of Canada in *Uber Technologies Inc v Heller* [2020] SCC 16, which held that an arbitration clause was invalid on this ground. And the third, focusing on developments on the domestic front, includes cases such as *Patel v Mirza*, which introduced a 'structured discretion' into the law of illegality (Burrows, 'A New Dawn for the law of Illegality' in Green and Bogg (eds), *Illegality after Patel v Mirza* (Hart 2018) 23). The abandonment of the 'reliance rule' (a rule-based method) in favour of a structured discretion (a contextual, standards-based method) is an example of the less 'formalist' approach for which Mitchell advocates.

It should be said that these are controversial cases on which to hang one's hat. But that is perhaps inevitable given that the whole point of the book is to challenge the currently dominant formalist approach to contract law. Unfortunately for those minded to agree with Mitchell's claims, the ultimate conclusion reached in Chapter 7 is that a common law revival is unlikely. She writes:

> [C]ourts have demonstrated that originality in contract common law is still possible. But these developments are vulnerable and liable to fail when located within a formal law that does not admit innovation easily and where significant impediments to change are presented by the legal system. … In view of this, we can expect that the influence that the complex commercial contract exerts over contract law is not likely to be surrendered any time soon (p. 201).

Mitchell argues in her final Chapter 8 that while some 'might be quite content with this state of affairs' (p. 208), such a limited vision for contract law means that the common law of contract 'will have little to contribute to the important

task of controlling the abuse and exploitation of contract norms and have nothing to say about the role of contract in society' (p. 208).

Overall, *Vanishing Contract Law* is a fascinating read. It challenges commonly held views about how contract law does and should work while anticipating the objections that a 'formalist' reader might raise along the way. This is not to say that all readers will ultimately be convinced that anything is in need of change (though no doubt many will be). But at the very least, by reading the book they will have been forced to re-examine and justify their own beliefs about contract law. The author is to be congratulated on her valuable contribution to contract law scholarship.

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