

# **PRIVATE LAW EXAM NOTES**

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# CONTRACTS

## CONTRACT THEORY

A contract is an agreement or a set of promises that the law will enforce, breaches of which provide remedies and it is the expression of the joint will of parties engaged in a transaction. They facilitate the freedom of parties to create their own private law.

Fried; contracts are based on moral obligations to keep a promised performance.

Barnett; a contract is based on consent to the transfer of entitlements. A person who manifests an intention to assume a legal obligation invokes the institution of contract and incurs a moral obligation to perform that promise.

Trebillock; that a contract can be seen as a mechanism that facilitates economically efficient exchanges. Contract law prevents opportunistic behavior by enforcing contractual obligations, provides a set of default rules, saves parties the effort/expense of negotiating all terms of transactions and fills gaps in contracts, addresses market failures such as misinformation and improper pressure.

Hillman; contract law is a rich combination of normative approaches and theories of obligation.

Critical Legal Studies; contract law is a set of contradictory formal rules that serve an ideological function masking the political and social issues underlying particular disputes and they perpetuate a legal order that protect the interests of the powerful.

Gender; contract law reflects a masculine viewpoint with its emphasis on abstract rules and its disregard of values such as co-operation and respect for others.

Social Relationships; the behaviour of parties is affected by their social relations and broader social context. It is based on trust rather than legal sanction.

Braucher; contracts are a form of regulation. Law determines the validity of contracts, interprets their language and conduct of the parties, filling gaps in agreements.

Collins; contracts are a form of regulation of markets and exchanges; the private law of contract gives rights to the parties and allows them to enforce those rights through the courts. This is contrasted to the public regulation of exchanges through legislation that sets standards and establishes government agencies to enforce compliance

Internationalisation of contract law; jurisdictions converge. There are moves to harmonise and standardize the principles of contract law in relation to international transactions

## PRIVATE LAW AND THE PLACE OF CONTRACT LAW

Private law is used to describe an area of law comprising the law of obligations and property. They are private because the legal rights are exclusively enforceable by the individuals who are recognised as holders of the rights and who may choose whether or not to enforce them.

Torts committed in a contractual context: if someone is misleading they may only be able to have an action for damages for breach of contract if the statement was incorporated into the contract. However, there may be an action in tort for deceit or negligence.

Concurrent liability: where there are contractual obligations to take reasonable care in performing services this may give rise to actions in contract and tort. Duplication of damages is not permitted but you can 'assert the cause of action that appears to be the most advantageous' (*Bryan v Maloney*)

Torts	Contracts	Unjust Enrichment
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Obligation to avoid causing harm to others	Obligation to perform promises	Obligation to restore unjust gains
All are bound not to commit torts	Self-imposed obligation, voluntary agreement	Specific context: when someone has been unjustly enriched at the expense of another
EXCEPTION: Can be a self-imposed duty of care	EXCEPTION: contracts may impose duties not expressly agreed to	
Doctrine of duty of care: the duty to avoid committing torts is owed to everyone/ foreseeable victims	Doctrine of privity of contract: duty is owed to one party	
The standard of care is objective	Strict liability: all breaches are punishable even without the intention to breach it or carelessness in doing so	Liability is quasi-contractual because it was based on an implied contract to repay money or to pay a reasonable value for goods/services rendered.
Damages: compensatory damages - put the plaintiff in the position they would have been in had the tortious duty not been breached (status quo ante)	Damages: compensatory damages - put the plaintiff in the position they would have been in had the contract duty not been breached (status quo ante)	Damages: compensatory, status quo ante OR realisation of an exchange, the effect of recovery of a reasonable sum for services rendered or goods delivered. Claim to recover money paid (under mistake) or a claim to recover reasonable remuneration for services rendered or goods delivered (under an unenforceable contract)
Damages put the victim in the position they would have been in had the tort not been committed.	Damages put the promisee in the position they would have been in had the contract been performed, protecting the promisee's expectation interest.	Damages aim to give back to the plaintiff the value obtained directly from the plaintiff's labour or assets.
Tortious wrong is the tortfeasor's failure to avoid harming the plaintiff or to take appropriate care of the plaintiff's interests	The contractual wrong is the promisor's failure to perform the promise	The wrong is the fictional/implied promise designed to provide the plaintiff with a basis for recovering an unjust gain under the constraints imposed by other forms of action.
Purpose: to protect individuals from interferences that make them worse off (injury, property damage, reputation, diminution of wealth)	Purpose: to ensure that the promisor improves the position of the other party by providing the	

	promised money, property or services.	
Duties are negative – prohibiting antisocial, harmful behaviour	Duties are positive – requiring the promisor to act affirmatively in the promisee's favour.	

### Equity

It is compared to the common law as a system of doctrines and remedies as a means of remedying defects in the common law (developed by judges in England). The law of contract, torts and restitution are common law. In the middle ages there was a dissatisfaction with the common law system because of the limited remedies (payment of damages). The Court of Chancery addressed these inadequacies e.g. by ordering someone to perform a contract (specific performance) or to refrain from committing a tort or breach of contract (injunction).

### History of Equity

In the 13<sup>th</sup> century, dissatisfied litigants petitioned the King to intervene in disputes. These were referred to the chancellor. The Court of Chancery was developed to hear these petitions. Originally disputes were resolved on a discretionary basis, according to what the conscience of the defendant required. Eventually legislation codified rules and cases were decided on precedent. The **Judicature Act (1973)** merged common law and equity. Although their administration has been merged, the bodies of principles have not been fused. They provide different remedies – equitable remedies are available at the discretion of the court, unlike common law remedies which are available as of right.

### Equitable Obligations

- Equitable estoppel: obligation not to harm others by behaving inconsistently. This arises where promises and representations have been relied on. It enforces promises and fulfils expectations and it is also concerned with providing protection against harm (similar to contracts and torts)
- Fiduciary obligation: obligation to act solely in the interest of those who repose special trust and confidence in us. This arises where a person (the fiduciary) undertakes to act in the interests of a second person (the principal or beneficiary). And has the ability to exercise powers and discretions that affect the interests of the beneficiary. He reposes trust/confidence in the fiduciary and is entitled to expect that they will act solely in their interests. Fiduciaries must not profit from their position and must ensure that their personal interests do not come into conflict with their duties to the beneficiary. The remedies for breach are restitutionary (where the fiduciary profits from the breach of duty) and sometimes compensatory (where losses are suffered by the beneficiary as a result of the breach of duty).
- Obligation of confidence: obligation not to misuse confidential information. The remedies are sometimes restitutionary (where profits are made from the misuse of the information) and sometimes compensatory (where losses result from disclosure of the information).

### Equitable doctrines and remedies in context

1. Equitable remedies supplement the common law remedy of damages in the enforcement of contracts. Specific performance and injunction will be granted in circumstances where the common law remedy of damages would be inadequate.
2. A contract will be set aside or rescinded in equity where there has been unconscionable conduct in the bargaining process (misrepresentation, undue influence or unconscionable dealing)
3. Equity will rectify a written document where the parties have by mistake inaccurately recorded the terms of their agreement

### Misleading or Deceptive Conduct

A person induced to enter a contract by a false statement that did not become part of the contract might claim damages for loss suffered. A contract might be set aside in equity if it has been induced by a misrepresentation.

**Fair Trading Act 1986 (NSW)**: prohibits misleading and deceptive conduct. People who suffer loss as a result of contravention of these provisions have access to a wide range of remedies (damages, rescission). If it happened in trade or commerce, the limitations are not hampered by the limitations on claims for damages imposed by torts (culpability) or limitations on claims for rescission imposed by equity.

### **PS Atiyah “Contracts, Promises and the Law of Obligations”**

#### Distinction between voluntary and imposed obligations

The function of contract law merely gives effect to the private autonomy of contracting parties to make their own legal arrangements. This freedom of contracts/ contractual autonomy became abused by parties with greater bargaining power so it has been curtailed by the law.

#### The Paradigm of Modern Contract Theory

Contracts are exchanges of promises deliberately carried through by the process of offer and acceptance with the intention of creating a binding deal. When the offer is accepted a contract comes into existence before anything is done by the parties. They are bound because they intend to be bound. Damages represent the value of the innocent party's disappointed expectations. You can get damages even when the contract is still executory (the defendant attempted to withdraw from the contract before either party had started on their consideration). The law of contracts consists of power conferring rules and facilitates the dealings of private parties to make use of them if they wish.

#### Presumptions:

- (a) Intention rather than Actions: contracts are what people intend rather than what they do. They are a manifestation of intention, not the actual intention. Actions are important in measuring the extent to which performance falls short of promise.
- (b) Contract as a Thing: contracts can be made, broken, discharged. You would not, however, conceptualise a tort as a thing.
- (c) Deterrent role played by the courts: the function of the courts is the enforcement of contracts by threatening penalties or the promise of rewards to encourage citizens to comply with socially acceptable behaviour. It provides machinery for settling disputes by peaceful and fair means.
- (d) A Single Model of Contract: there is a presumption that there is one model to think about the general principles of contracts – the economic model of the free market.

#### Defects in the presumptions:

- (a) The single model of contract: there are too many ways to conceptualise contracts, there is no such thing as a typical contract.
- (b) The voluntary assumption of contractual obligations: some contracts are formed in a way that does not suit this definition (boarding a bus, purchasing goods in a shop) these should not be talked about as an exchange of promises.
- (c) The importance of benefits rendered and detrimental reliance: only people who rely on promises and are worse off get damages. Also if someone says they are going to give someone a benefit and do not follow through, they are just as liable, even though there has been no damage.

- (d) The use of the objective test: actual subjective intent is normally irrelevant, it is the manifestation of intent that matters. The truth is that people are not bound because they intent to, but because of what they do.

#### Rethinking the law of obligations

- The distinction between torts and contracts: when you reconsider contracts, these two work in the same way – duties are imposed by law, they both reflect society's standards of fairness and reasonableness.

### **OFFER**

<b>Offer – General Rule</b>
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***Gibson v Manchester City Council***; an offer is final if a reasonable person in the position of the offeree would infer that the offeror intended to allow himself/herself to be bound without further negotiations, from his/her words and conduct.

### **Unilateral Contracts**

***Carlill v Carbolic Smoke Ball Company***; an offer can be made to the whole world in a 'unilateral contract'. Notification of acceptance may not be necessary. An offer may impliedly indicate that the offeror does not require notification of acceptance. The performance of the requested act constitutes acceptance.

### **Tickets**

***MacRobertson Miller Airline Services v Commissioner of State Taxation***; in the case of tickets, the ticket represents an offer to the passenger only accepted when the passenger turns up to travel, or when a reasonable period of time has elapsed after the terms and conditions are taken to be understood.

### **Invitation to Treat**

***Pharmaceutical Society of Great Britain v Boots Cash Chemists***; items displayed for sale in shops are regarded as invitations to treat, not offers. Rather, when the customer presents the item to the cashier, the makes an offer which is then accepted when the cashier charges him money.

### **Termination of an Offer**

***Manchester Diocesan Council v Commercial and General Investment***; when an offer is open for a specific time, after that time, the offer lapses. If there is no time limit, there is an implied reasonable time limit.

***Goldsbrough Mort & Co v Quinn***; an offer, even when open for a period of time, can be revoked at any time before acceptance (unless it is an option). But if the offeree has given consideration to keep the offer open for an express period of time, then it cannot be revoked prematurely.

***Byrne v Van Tienhoven***; revocation is not effective until communicated to the offeree

***Hyde v Wrench***; a counter-offer kills the original offer

### **Revocation of a Unilateral Offer**

***Mobil Oil Australia v Wellcome International***; an offer made in return of an act can be revocable at any time, even after commencement of the act sought by the offeror for acceptance. Whether the offer can be revoked is based on the circumstances of the case and whether the offeree has impliedly taken on the risk that the offer might be revoked. This is based on:

- Offeror's knowledge that the offeree had commenced
- Offeree's understanding of offeror's ability to revoke the offer
- Act requested by offeror was detrimental to the offeree
- Circumstances indicating an intention as to whether the offer is revocable.

If it isn't clear, it is not fair to the offeree and the court is inclined to find an implied contract to keep the main offer open.

### ***Gibson v Manchester City Council***

**Material Facts:** The council said they 'may be prepared' to sell a house. Gibson completed the application form, except for the purchase price and returning it to the council. The council did not go through with the deal. Gibson argued that the council made an offer to buy the house in return for payment.

**Legal Issue:** Whether the arrangements made by the council constituted a contractual offer?

**Ratio:** LORD DIPLOCK held that to adjudicate whether there was an offer, the court will determine whether the reasonable person in the position of the offeree would infer that the offeror intended to allow himself/herself to be bound without further negotiations from his/her words and conduct as a whole. The uncertainty of the language 'may be prepared to sell' and 'to make a formal application to buy' reveal that

the correspondence sets out the financial terms on which the council *might* be prepared to consider a sale of purchase – but this does not constitute a contractual offer.

### ***Carlill v Carbolic Smoke Ball Company***

**Material Facts:** the defendants manufactured a smoke ball which claimed to prevent colds and flu. They made an ad saying they would pay anyone who got a cold/flu after using their product 3x daily for 2 weeks according to the directions of use. They also said they had placed money in a bank account to back up their claim. The plaintiff contracted the flu after using the smoke ball in the way that was insisted and went to claim the money.

**Legal Issue:** Whether an offer can be made to the entire world?

**Ratio:** The ad was not ‘mere puffery’ because the money was proof demonstrating their sincerity. Unilateral contracts can be formed where one sets terms that anyone can take up. Anyone who performs the conditions in the ad has ‘accepted’ the offer.

### ***MacRobertson Miller Airline Services v Commissioner of State Taxation***

**Material Facts:** a person buying a ticket would pay a fare to reserve a seat on a flight. A condition was printed on the ticket – no liability is incurred by the airline upon abandoning a flight and the passenger would be entitled to a refund of their fair.

**Legal Issue:** Whether a binding agreement was formed at the time of ticket issue?

**Ratio:** In a ‘ticket case’ the ticket is seen as an offer by the airline able to be accepted or rejected by the passenger upon reading the conditions. Acceptance of an offer is not immediately made after the issue of the ticket, but through conduct (turning up to the flight) or a reasonable time after the issue. What constitutes a ‘reasonable time’ will differ depending on the facts of each case.

### ***Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern)***

**Material Facts:** There was a self-service checkout but the purchase of drugs had to be supervised by the pharmacist who could deny a customer the drugs.

**Legal Issue:** Whether having items on a shelf constitutes an offer for a customer to buy?

**Ratio:** No, an offer is made when the customer puts the drugs in their basket. It is an offer to buy the drugs in exchange for the transfer of title. The pharmacist at the checkout accepts that offer by transferring title. Displaying the drugs was an invitation to treat. There is no different implication as a result of the ‘self-service’ checkout. A shopkeeper is not making an offer to sell every article in the shop to any person who can insist on buying any article by saying ‘I accept your offer’.

### ***Goldsbrough Mort & Co v Quinn***

**Material Facts:** Quinn stated in a document he would sell his house for a specified amount and would leave the offer open for a week. He revoked the offer before the week.

**Legal Issue:** Whether the offer could be withdrawn before the week was up?

**Ratio:** An offer may be withdrawn at any time before acceptance. Even if an offeror promises to hold the offer open for a certain amount of time, he can withdraw or revoke the offer at any time as long as it hasn’t



been accepted. This is because there is no consideration for a promise to keep an offer open so it is not binding. Withdrawal is only effective once it has been communicated to the offeree. If the offeree wants to ensure the offer is not withdrawn for a period of time, he will have to supply consideration, this practice is called an 'option'. If consideration has been given in return for a promise to hold an offer open, that promise will be binding.

### ***Mobil Oil Australia v Wellcome International***

**Material Facts:** Mobil set goals for franchisees to reach a certain goal with the reward for a franchise renewal without cost. 3 years later, Mobil wanted to revoke the offer and the franchisees sued for breach of contract.

**Legal Issue:** Whether a unilateral contract can be revoked?

**Ratio:** There is no universal rule with regards to revocation of a unilateral contract and they must be judged case by case. A unilateral contract is one in which the act of acceptance of the offer is also a consideration for the promise offered. The act of acceptance leaves the contract executory only on the part of the offeror. An offer made in return of an act is revocable at any time, even after commencement of the act sought by the offeror for acceptance. The offeror will only be prevented from revoking the offer where there is consideration. In this case, the franchisees did not suffer a detriment by improving their own performance and therefore there was no real consideration.