

Contract law

LAWS1015

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1 Introduction

A Introduction

The course shall also introduce some of the **perspectives that criticise** the state of the law:

- (a) *The realist view*: in practice courts focus on policy objectives to decide in whose favour a legal rule should be applied
- (b) *The critical legal studies approach*: contract law is indeterminate and used to legitimise both the system and the decisions of those who wield power
- (c) *Contract as promise thesis*: promise alone is the basis of contract enforcement
- (d) *Feminist approach*: gender issues should be considered in critically evaluating existing legal doctrine
- (e) *Relational approach*: contract is unsuitable to the resolution of contract disputes because it gives insufficient emphasis to the relational interests and social conditions to contracts
- (f) *Law and economics approach*: the law is incomplete without an economic perspective
- (g) *Sociological approach*: business people do not generally consult lawyers when planning contractual relationships or even when a contract dispute arises.

What is a contract? Perhaps the best definition is “an agreement that will be enforced by the law”. Generally, definitions of contract are positive law ones – natural law doesn’t do so well in this area.

Contract law fits into a number of areas. Most notable is the law of obligations:

- Tort: imposed obligations
- Contract: consent (voluntary obligations)
- Unjust enrichment
- Other

Contract law is a relatively modern area of law. Prior to modern contract, in the days of forms of action, the closest we had was the action in debt. All such actions were **f**, and one couldn’t sue under this action unless you had completed all of your obligations. Then, in competition, came **sumset** (spelling?) – to bring an action on a promise alone. So today’s contracts can proceed simply on an exchange of promises.

Many theorists argue that a contract should not exist until one party has acted in reliance on that promise – but this is not the law. The notion of a promise can be seen as a voluntary assumption of obligation. Note that a promise need not be explicit – in many everyday contracts, promises are implicit (consider buying something).

So, the way to approach a contract problem:

1. Have we got a contract?
2. What are the terms of the contract
3. “Contraction” – what do the terms mean? (we look at exclusion clauses as an example)
4. Performance – what has to be done?
5. Breach – what are the results of a party failing to meet their obligations?
6. (Termination)
7. (Remedies)

http://www.slate.com/articles/life/dear_prudence.html

Topics 6 and 7 form part of the 8cp course only. For those doing the 6cp course (me), these will be covered in Torts and Contracts 2.

B Freedom of contract?

While traditionally contract has been considered part of private law, increasingly public issues are involved. While the notion of ‘freedom of contract’ is still mentioned, not all contracts concluded between parties will be enforced by courts. Furthermore, legislation and common law doctrines severely limit the extent to which parties can behave ruthlessly in business deals.

Why enforce contracts?

Note: most of this section (Freedom of contract) isn't important; just for background and interest.

Development of contract law accompanied the movement into a mercantilist and then lassies-faire capitalist society. Thus the initial proposals centred on freedom of contract – that the state would enforce any agreement between parties. In most cases, current rules reflect this.

The leading theory for this notion was the “will theory” – that a contract comes from a subjective meeting of the minds. But this means conflicting testimonies = no meeting = no contract. So we moved to an objective contract theory, requiring objective consensus.

The objective test in contract law comes from a reasonable person in the position of one of the parties (not tort's fly-on-the-wall reasonable person). So you're actually trying to determine the presumed intention of the parties.

The deal of freedom of contract is attached to the passing of workplace law in the UK, prohibiting, for example, child labour. There is an argument that freedom of contract is on the rise again – e.g.: IR reforms.

Capacity

[801]: There is a presumption of common law that a person who enters a contract has full capacity to do so, but this may be fully or partially rebutted in some circumstances. Persons alleging that they are protected from the natural consequences of their actions bear the burden of proving incapacity: **Borthwick v Carruthers** (1787) (UK).

[802-803, 827] **Minority.** By ~17th century the common law had established 21 as the age of attainment of adult status, though for historical reasons not very relevant today (age at which one had the strength to wear knight armour). In 1969 this was lowered to 18; Australian jurisdictions followed soon after (NSW in 1970 and all others by 1981). Generally, those under 18 are not treated as though of full age, though there are some legislated exceptions.

NSW has taken the unique step of creating legislation to deal with the otherwise unsatisfactory area of minority and contract. In particular, criticisms of the common law centred on the unfairness of deterring dealings with minors (both to the minor and the other party) and on the inconsistent approach of the common law to the area.

Many contracts (those 'for the benefit of the minor') are now *presumptively binding* on the minor – that is, binding unless another factor that would ordinarily void a contract is raised and proven – and those that aren't can in many cases be made so by affirmation by the minor on turning 18.

[838] **Mental disability/intoxication.** The law tries to accommodate two conflicting concepts when dealing with these issues. On the one hand is the notion that where a contracting party's mental capacity does not reach the relevant legal standard, assent should be treated as a nullity, and the contract as absolutely void. On the other hand, a contracting party who has some, though inadequate, understanding should not be allowed to disown assent, thereby depriving the other party of a contract.

Some matters should be noted:

- It is not vital to choose between expressions such as insanity, lunacy, mental illness, mental disability or mental incapacity.
- We are not concerned with those whose property and affairs have been placed in the control of a committee or official because they have been found unable to manage these themselves.
- Both mental disability and alcohol intoxication are governed by the same principles.
- Although a contract may be found not binding because of these factors, there may be liability in restitution for necessities supplied.

[849-850] **Companies.** Companies have a legal personality of their own which is allowed to enter into contracts. Corporations may be corporations sole (one individual who is an office-holder) or corporations aggregate (two or more individuals). Illustrations are universities, local councils and companies which are incorporated upon registration under the **Corporations Act 2001** (Cth). There are three aspects to consider in discussing contracts of corporations: vires (the capacity of the company to become legally bound); the making of the decision to contract; and the mode of expression of contractual assent.

[869] **The Crown.** The traditional common law rule was that the Crown, being the fountain of justice, could not be forced into court as a defendant to an action. This has been overcome by statute (the **Judiciary Act 1903** (Cth), and an Act in each state). Even when the rule applied it was still necessary to distinguish between 'the Crown', public officers, and bodies which might be created as bodies corporate (that is, bodies that have a legal personality of their own, such as the ABC, AWB or NSW Egg Corporation).

[874] **Bankrupts.** Bankruptcy does not affect contractual capacity (that is, the capacity of a person to become contractually bound), but does affect the operation of contracts made by a person who is at the time, or subsequently becomes, bankrupt.

[877] **Married women.** The position at common law was that a married woman has no legal personality independent of her husband and therefore has no contractual capacity. Further, her property was vested in her husband. This was the source of contractual disadvantage for such women (as there are no funds on which to draw for contractual liabilities, meaning other parties were unlikely to contract with them), and has largely been altered by statute.

In NSW alone, is it still possible to create restraints upon anticipation. These restraints entitle a married woman to the use and enjoyment of property and any income from it, but prevent her from selling or transferring the property or subjecting it to liability. The restraint takes effect on marriage and is co-extensive with her status as a 'married woman'. The courts are, however, empowered to release a married woman's property from restraint where this is for her benefit and with her consent (**Conveyancing Act 1919** (NSW)). Similar powers exist in Tasmania, Victoria and Western Australia, though these states have prohibited the creation of any new restrictions upon anticipation (as have the ACT and, probably, NT). Queensland and South Australia have also invalidated all existing restrictions.

Public policy and illegality

[1601-1619] A contract may be illegal because it is prohibited by statute, or because it infringes a rule of public policy. However, a simple failure to meet formal requirements of contract does not necessarily render the contract 'illegal'.

Illegality need not always be pleaded. While it is usually pleaded as a defence in the majority of cases, because of the nature of illegality, the court may be obliged to consider it even if not raised. In **Knowles v Fuller** (1947) (NSW) Jordan CJ said that a court 'will not entertain a defence of illegality which has not been pleaded' unless:

- the contract giving rise to the plaintiff's claim was on its face ('ex facie') illegal; or
- the plaintiff is unable to prove the case without relying on an illegal transaction; or
- the fact of illegality comes to light at the trial of the action and it is clear from the circumstances that there is no way in which the illegality could have been cured (regarded as an exceptional case. E.g.: if illegal because there was failure to obtain approval, there might have been evidence available to suggest approval was in fact obtained which was not raised because the legality was not challenged – so the court cannot consider illegality on its own accord in such a case).

Perhaps the most basic general principle is that a contract entered into with the object of committing an illegal act will not be enforced.

Statute may affect the way in which contracts are enforced. Statute may prohibit (expressly or impliedly) the creation of a particular class of contract (or, more broadly, agreements, arrangements or understandings). On the other hand, statute may simply render such contracts null and void. Further, parliament may merely declare void a particular class of contractual provision, and may void the contract

only as against a third party without affecting its enforcement between the parties. Only in the first place is the contract "illegal". Similarly, not all contracts which are contrary to public policy are illegal – they may simply be void or unenforceable.

Start again at 1607

Immoral contracts – marriage and sexual morality

Andrews v Parker (1973) (Qld - SC)

Facts: A 55 year-old widower (ptf) met a 41 year-old woman (dft) and they began a de facto relationship sometime after Easter in 1968. The ptf gave the dft his wages and bank books and the dft gave him whatever money he wanted from them. In August, under pressure from the dft, the ptf signed the title to his house to the dft, on three conditions, one of which being that the title returned to him if she returned to her husband. At trial, where it became clear it was a deliberate scheme, the dft argued that this term was against good morals (aiming to split a marriage), and so the agreement was an immoral one that should not be enforced.

Held:

- The common law has treated differently contracts that aim to separate spouses, and those that simply deal with the consequences of a separation that has already occurred.
- At any rate, the law is that immoral contracts will not be enforced; not that contracts against marriage will not be enforced. The moral standards that form the test are those of the present day, not those of when the principle or law was laid down.

Note that such agreements ('cohabitation agreements' for de facto relationships) are commonplace today, and are enforceable.

Although public policy is meant to prohibit anything contra bonos mores ('against good morals': **Jones v Randall** (1774) 1 Cowp 37 at 39), the law has primarily been concerned with sexual morality. Can you suggest why this is so?

Restraint of Trade

The common law must sometimes balance two principles: upholding freedom of contract of individuals to agree to contracts and the public interest in freedom of competition and trade. The issue is whether the restraint agreed to in a contract is reasonable in the circumstances. Often opinions differ as to the correct result.

[1634-7, 1648, 1653]

Some agreements that restrict competition are prohibited by **Trade Practices Act 1974** (Cth), irrespective of whether or not those agreements would be enforceable at common law.

Other vitiating factors

Some contracts will not be enforced because they are not considered 'fair', because they are affected by *undue influence*, *duress* or *unconscionability*. These ideas are considered later. Still other clauses may be held unenforceable on public policy grounds, such as harsh *exclusion clauses* (clauses excluding liability) and *penalty clauses*. These are dealt with later too.

This entire section is unfinished because it isn't important.

2 Agreement

A Offer and acceptance

Offer and acceptance are useful analytical tools, but they do have their limits.

To show that a contract is formed, there must be a number of formalities:

- An agreement
- Consideration for that agreement
- Intention to contract [forms part of an agreement; really a theme rather than its own requirement]

The easiest way to settle a question of agreement is if the parties have signed a written agreement. Another way is via the tools of offer and acceptance. While these are useful analytical tools to solve disagreements about whether an agreement was reached, or when it was reached, they do have limitations. In many cases, the construction of an 'offer' and an 'acceptance' will be highly artificial (e.g.: when the contract is formed by the exchanging of duplicate copies of the agreement between parties, as is common in property sales).

Jargon: **offeror/promisor** makes an offer to the **offeree/promisee**.

Offer

Hint: when dealing with questions of these requirements, is usually best to start with a definition. This outlines the requirements and such.

Offer

An offer is an indication by one person of their willingness to contract on certain terms without further negotiation.

Determining whether an offer has been made is an objective test from a reasonable person in the position of the promisee.

Australian Woollen Mills Pty Ltd v Cth (1954) (HCA)

Facts: (After a long history), the Commonwealth Government, via some agency, paid a subsidy to manufacturers who bought local wool and used it to make certain goods. Without getting into confusing details, the Commonwealth ended the subsidy but continued to pay it for stocks of wool that were used for eligible purposes. The ptf claimed that bought wool in pursuance of an agreement, and were owed subsidy payments, but the dft refused to pay.

Held:

- This type of contract ('promise for an act' type; the court criticised the use of the word 'unilateral') requires a *quid pro quo* – that is, the statement and act must be firmly linked to one another. It is not sufficient that the ptf's action (buying wool) happened to coincide with the dft's statement.
- In determining the above, it is necessary to consider the context of the situation. For example, A simply saying to B "I will give you \$100 to fly to Sydney", and B doing so is not sufficient to establish a contract. However, if evidence suggests that B was not going to fly to Sydney otherwise, and had raised objections to the request on the basis of the cost involved, this may suggest B's action was in fact a result of A's statement.
- What would a reasonable AWM think?
 - Government has no commercial interest
 - Only purpose was to safeguard the industry
 - No request or invitation to buy wool from them
 - I.e.: no offer
- There must have been a voluntary assumption of legal obligation by the offeror, and hence the offer must have been intended to give rise to legal obligation.
- Types of things to consider in determining whether there has been offer: a **request**, an **invitation**, or some **commercial interest**.

Pharmaceutical Society of Great Britain v Boots Cash Chemists Ltd (1953) (UK - CA)

Facts: The defendant owned a pharmacy where, in one section, drugs were displayed on shelves and customers were able to help themselves. All purchases of said drugs were observed by a registered pharmacist, who was authorised by the defendant to refuse any sale of drugs to any customer. Under the relevant legislation, the sale of certain drugs had to be either effected or supervised by a registered pharmacist. The plaintiff (appellant) sought a finding that this method of sale did not meet the legislative requirement, since once a customer has removed the drug from the shelf and placed it in a bag, the contract is complete and the store/pharmacist has no power to disallow that person to exit with the drug.

Held:

- Although goods displayed in a shop are able to be picked up and looked at by customers, “the contract is not completed until, the customer having indicated the articles which he needs, the shopkeeper, or someone on his behalf, accepts that offer” (Somervell LJ).
- Displaying goods in a shop is simply an “invitation to treat”, i.e.: calling for offers.

There is a distinction between an offer – a willingness to be bound – and an **invitation to treat** – a willingness to negotiate, or a request for offers to be made. To decide which applies, use the reasonable person test from the position of the alleged promisee. However, there are some things that are presumed to be invitations to treat, for example:

- Circulating merchant price lists (catalogues etc.) – but some advertisements may be offers
- Mere statement of a price in reply to a query
- Agreeing on price alone may not be sufficient in some cases: **Seppelt & Sons** (below).

Seppelt & Sons Ltd v Commission for Main Roads (1975)

Facts: Seppelt wanted to buy land from the commission. The parties had agreed on a price but nothing else.

Held:

- Price alone is not sufficient to form a contract in this case; much more was to be decided.

Disc:

- Read Justice Melding ^{sp?} – good way to answer contract law question.

- Making a bid at an auction is an offer, which is accepted by the auctioneer whacking the hammer down (for the highest offer).
 - In cases of auctions listed with “no reserve”, there is English authority that this constitutes an offer on the part of the auctioneer (who is not necessarily the seller), accepted by the highest bidder.
- Ads calling for tenders are invitations to treat, but they do constitute an offer to at least consider every tender that is offered.
- Goods in self-serve stores are invitations to treat (**Boots Cash**).

Offers can be made to the whole world or a more limited group

Carlill v Carbolic Smoke Ball Company (1893) (UK - CA)

Facts: The Carbolic Smoke Ball Company ran an advertisement for their smoke balls claiming that they prevented influenza. They stated that £100 would be paid to anyone who uses the smoke ball as directed and still catches influenza, with £1000 having been deposited in a bank to pay such reward. Carlill bought & caught, and sued for their £100. Carbolic made several claims in defence, including that the alleged contract was with the whole world, and you cannot contract with the whole world; there was no notification of acceptance by the plaintiff; the wording was vague and ‘a mere puff’ rather than a legal offer; and there was no consideration.

Issues:

- (1) Was it a mere puff- no reasonable person would see it as a contract
- (2) Language was too vague – no time limit
- (3) Can you have a contract with the whole world: can you have a contract if there is no particular offeree?
- (4) Must acceptance of an offer always be communicated to the Offeror?
- (5) Did Mrs Carlill provide any consideration for the Co’s promise to pay 100 pounds.

Held:

- Offers can be made to the whole world (unilateral); the contracts are made with a more

limited group (those who accept the offer) By performing conditions on faith of offer, they accept the offer(3).

- The wording was not so vague as to create a legal obligation (2). The question of when the person can contracted the flu and still claim a reward can maybe be solved by reasonableness (Lindley LJ), but in any case certainly as long as the ball is being used (majority), which applied here. The extravagance of promises made by the defendant is their own fault and does not bar them being held to those promises (Bowen LJ). Regardless, the presence of the supposed track record of the ball, and notably the claim that money was deposited ready to pay the reward, means that the advertisement can clearly be interpreted as more than 'a mere puff' (1).
- While generally notification of acceptance is required to form a legally binding contract, the offeror may dispense with the need for such notification (since notification is for the benefit of the offeror) – absurd to assume it's necessary. It is only necessary for the other party to follow the indicated mode of acceptance, and if (expressly or impliedly) the offeror suggests no notification is necessary, then it is not necessary (4).
- The use of the smoke ball three times a day for two weeks (or whatever it was) is clearly detrimental to the party using it, so this is sufficient for consideration (the general principle being that consideration can be any act done by the plaintiff for the advantage of the defendant – see her using it: confidence in product - or to the detriment of the plaintiff, with the express/implied consent of the defendant) (5).
- Ruled in favour of plaintiff.

Notes

- This is a 'unilateral', or 'promise for an act'-type contract (c.f. bilateral or promise for a counter-promise). In such contracts, the performance of the act called for is acceptance of the offer, the offeror normally being taken to have dispensed with the need for notification. Further, the party accepting the offer is not bound to do anything as they have not promised to do so.

Acceptance

Communication of acceptance is generally required

- Communication of acceptance is generally required
- Prior to that communication, the offeror is free to withdraw the offer
- An offer can only be accepted by the person to whom it was made
- Communication of acceptance must be given by an authorised person (agent of the offeree)
- An offeror can prescribe the method of acceptance. But it's always said in the textbooks that if you choose another method that is "just as effective", this will suffice.
- Silence cannot be acceptance

Felthouse v Bindley (1862) (UK)

Facts: Uncle was going to buy horse from nephew, but negotiations were not finished. Uncle eventually says "if I hear nothing more, I'll assume it's mine for £34. Nephew tells auctioneer to cancel auction, but he sells it by mistake. Uncle then sues auctioneer in conversion, claiming that the horse was his at the time it was sold.

Held: ▪ Silence cannot be acceptance. Hence no contract of sale, and the horse was not the uncle's.

Disc: ▪ You can accept a contract by conduct (**Empirnall Holdings**). Does the conduct of the nephew in cancelling the sale not show acceptance?

Empirnall Holdings Pty Ltd v Machon Paul Partners Pty Ltd (1988) (NSW)

Facts: EH, a property developer, hired MPP, architects, to do some plans. MPP sent over some contracts, and were told the principal "does not sign contracts". At any rate, they were accepted and work progressed. EH then tried to avoid paying, claiming he was not contractually bound to do so.

Held: McHugh J (concurring: Kirby P; Samuels JA)

- Though communication of acceptance is generally required, one's conduct may signify