Principles of Private Law
LAWS1150

Contracts

Week 1
Week 1 Online Activity Readings:
Reading: Contracts Textbook

The Concept of Private Law and the Place of Contract Law within it

The law of obligations is concerned with the obligations owed by individuals (including legal entities, such as corporations) to one another.

What distinguishes contractual obligations from other private law obligations is that the obligations owed by contracting parties are self-imposed, while other private law obligations are imposed by law.

- Contractual obligations may be imposed on both parties by the state or by one party on the other.

The expression “private law” is commonly used to describe a field of law comprising the law of obligations and the law of property.

The law of property can be understood as “a category of law concerned with relations between people and things”.

In the case of both obligations and property, the relevant legal rights are “private”:

- They are exclusively enforceable by the individuals who are recognised as holders of the relevant rights and who may choose whether or not to enforce them.

- “Private law” has a significant public dimension

Torts committed in a contractual context

A particular incident may provide a plaintiff with actions in both contract and tort against a particular defendant.

- This is known as concurrent liability.

Contract as self-imposed obligation:

Contracting parties themselves voluntarily enter into an agreement, whereas we are all bound not to commit torts whether or not we have agreed not to commit them.

Contract as strict liability:

An award of compensatory damages is the primary remedy for both tort and breach of contract. The aim of such damages in both instances is to compensate for loss: to put the plaintiff in the position he or she would have been in had the contractual or tortious duty not been breached.

- In contract, the wrong is the promisor’s failure to perform the contractual promise.

The law of contract is concerned to ensure that the promisor improves the position of the other party by providing the promised money, property or services.

Unjust Enrichment

The law of unjust enrichment is another principal source of obligations owed by individuals to one another.

- It is concerned with obligations to restore unjust gains.

Where a defendant has been unjustly enriched at the expense of the plaintiff, the plaintiff seeks restitution, which means the return of the benefit which has been transferred from the plaintiff to the defendant.

The liability to restore unjust gains used to be described as a “quasi-contractual” obligation, because it was based on an implied contract to repay money or to pay a reasonable value for goods or services received.

That obligation is not based on an implied contract and has a different legal foundation from contractual obligations.

Equity

Equity is also a rich source of personal obligations.

The word “equity” in popular usage means, among other things, the quality of fairness or justice.

Historically, the role of equity was to remedy injustice resulting from an overly rigid common law. In the 19th century, there was a decline in this ameliorative role. Towards the end of the 20th century, however, there was an equitable revival within the law of contract, which did much to restore equity’s role as the guardian of conscience.

Equitable obligations

Three equitable obligations are particularly relevant in the contractual context:

1. The obligation not to harm others by behaving inconsistently (equitable estoppel)
2. The obligation to act solely in the interests of those who repose special trust and confidence in us (fiduciary obligations)
3. The obligation not to misuse confidential information

Equitable estoppel creates liability where promises have been relied upon. Like contract, equitable estoppel involves the enforcement of promises, but it is concerned with promises that have been relied upon rather than promises that have been bargained for.

Fiduciary obligations are owed in certain situations where one 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 discretion that affect the interests of the beneficiary.

If one party divulges confidential information to another during contractual negotiations which later break down, no contractual duty to pay for the information ever arises, but equity may recognise an obligation not to use the information for any purpose other than that for which it was disclosed.

Equitable doctrines and remedies in contract

First, equitable remedies supplement the common law remedy of damages in the enforcement of contracts.

- The equitable remedies of specific performance and injunction will be granted in circumstances where the common law remedy of damages would be inadequate.

Secondly, a contract will be set aside or rescinded in equity where there has been some unconscionable conduct in the bargaining process, such as misrepresentation, undue influence or unconscionable dealing.

Thirdly, equity will rectify a written document where the parties have by mistake inaccurately recorded the terms of their agreement.

Statutory Obligations and Regulation

A number of statutes impose obligations that affect the formation, performance and enforcement of contracts. Some statutes also regulate the content of contract terms.

The statutory regime with the closest connection to contract is the *Australian Consumer Law* (ACL).

The Australian Consumer Law

The Australian Competition and Consumer Commission is given power to enforce certain provisions of the ACL, by seeking fines and remedies for affected parties.

- Parties who are affected are also able to seek redress by instituting legal proceedings of their own.

Unconscionable conduct

Part 2-2 of the ACL prohibits certain types of unconscionable conduct in trade or commerce.

Unfair contract terms

Part 2-3 of the ACL regulates unfair terms in consumer contracts.

Consumer guarantees

Part 3-2 of the ACL contains a regime of "consumer guarantees".

- The consumer guarantees provide a range of minimum standards of quality that apply to the supply of goods and services to consumers.

Classical contract theory
Classical contract theory is the set of ideas and assumptions that underpinned the development of contract law in England and the United States during the 19th century.

The latter half of the 19th century is often described as the classical age of English contract law.

There are two reasons for this:
- First, because of the extensive development of contract principles that took place during that period.
- Secondly, because the prevailing political and economic views of the time elevated the contract to a position of central importance in the law.

Classical theory remains important to us today because significant areas of Australian contract law are still based on the classical principles developed in England in the 19th century.

The law of contract that developed in the 19th century was influenced by <u>the will theory of contract</u>.
- According to the will theory, a contract represents an expression of the will of the contracting parties and, for that reason, should be respected and enforced by the courts.
- At the heart of the will theory is the notion that a contract involves self-imposed liability.

Ideology
The prevailing ideology was the liberal individualist philosophy of <u>laissez faire</u>, and the courts developed principles of contract law that were consistent with that philosophy.

- The parties to a contract were regarded as self-interested individuals who created their own private law through agreement.
- It was thought that individuals should be free to enter into whatever bargains they considered would benefit them and the courts should facilitate that freedom by enforcing whatever bargains individuals chose to make.

The political and social context in which modern contract law developed thus favoured individualism, self-reliance and the exercise of free will over government intervention and paternalism.
- The principles of modern contract law were founded on those concepts which were encapsulated in a political theory labelled <u>"contractualism" by Morris Cohen</u>.

"Contractualism in the law is the view that in an ideally desirable system of law all obligation would arise only out of the will of the individual contracting freely, rests not only on the will

theory of contract, but also on the political doctrine that all restraint is evil and that the government is best which governs least."

This approach had two principal effects:

- First, the courts were reluctant to recognise the existence of non-contractual obligations.
  A contract was found to have been made despite the fact that the parties had never communicated with each other or exchanged money or goods.

- Secondly, the principles of contract law were developed and justified by reference to an overriding concern with giving effect to the intentions of the parties.

The courts "felt that they were not imposing legal rules on the parties, but were merely working out the implications of what the parties had themselves chosen to do".

There could therefore be no room for any requirement of fairness in contractual exchanges or for the imposition of contractual obligations without the consent of the parties.

The textbooks helped to carve out contracts from an independent body of law, which was separate from property law, the law of tort and the law of restitution.

- Contract could therefore be seen as a branch of law that was exclusively concerned with voluntarily assumed obligations.

Criticism of the classical approach

- The first point is that the rights and obligations arising from a contract do not necessarily represent the will of the parties.

In determining whether a contract has been formed, the courts are not concerned with whether the parties actually intended to enter into a contract, but with whether a reasonable person would believe they intended to do so, based on their words and behaviour.

The content of a contract is also determined objectively: statements made during negotiations may form part of a contract if a reasonable bystander would think that a contractual promise was intended, and unsigned written terms form part of a contract if reasonable notice of the terms was given by one party to the other.

- A second problem with the classical approach to contract is that it assumes that contracts are fully negotiated between the parties.

- A third problem with the notion that contract law is fundamentally concerned with individual autonomy is the role played by the state in enforcing contracts and in establishing the legal framework in which bargaining takes place.

Coercion is "at the heart of every bargain" because it is "inherent in each party's legally protected threat to withhold what is owned".

Executory Contract: Contractual Duties which are still pending and incomplete.

Class 1A Readings:

Reading:

A contract can be made without an identifiable offer and acceptance, provided the parties have manifested their mutual assent.

Where the traditional approach cannot be applied it is relevant to ask:

- Whether in all the circumstances an agreement can be inferred;
- Whether mutual assent has been manifested; and
- Whether a reasonable person in the position of each of the parties would think there was a concluded bargain.

Offer

An offer is the manifestation of willingness to enter into a bargain.

Case:	*Gibson v Manchester City Council [1979] 1 WLR 294*
Facts:	-The trial judge held that there had been an offer and acceptance, and so a binding contract had arisen. -The only contract that is alleged is one made by letters accompanying documents passing between the parties. -An acceptance in writing of that offer by Mr Gibson.
Issue/s:	Is there a contract?
Arguments:	The documents relied upon as such in the particulars of claim did amount to an offer and an acceptance respectively and so constituted a legally enforceable contract.
Judgement:	Appeal allowed - Manchester City Council won
Key takeaways:	The language in the letters were not definite, as the word 'may' was used instead of 'will'.

The possibility of exceptional types of contracts which do not “fit easily into the normal analysis of offer and acceptance”:

Case:	*Carlill v Carbolic Smoke Ball Company [1893]*
Facts:	-The defendants manufactured a device called a ‘Carbolic Smoke Ball’ which was claimed to prevent colds and influenza. -The company placed an advertisement in many newspapers that stated ‘100 pound reward will be paid by the company to any person who contracts influenza, colds… after having used the ball as per the directions.’ -The plaintiff purchased the product with faith from the advertisement and used it as per the instructions until she contracted influenza. -The advertisement is an offer to pay 100 pounds to anybody who will perform these conditions and the performance of the conditions is the acceptance of the offer.
Issue/s:	Is there an offer here to be accepted?
Arguments:	-The advertisement is an offer to pay 100 pounds to anybody who will perform these conditions and the performance of the conditions is the acceptance of the offer. -The defendants argued that the document was a contract too vague to be enforced and that it is not a contract at all, it is only an offer made to the public.
Judgement:	Carlill won.
Key takeaways:	-There is a contract as Carlill purchased and used the product. -Carlill won as it is an offer that can be accepted by anyone as it is an ad.

Case:	*MacRobertson Miller Airline Services v Commissioner of State Taxation (WA) (1975)*
Facts:	-The passenger presented her ticket to secure their seats on the flight. -A condition printed on the ticket provided that the airline reserved the right to abandon or cancel any ticket or booking and that the passenger would then be entitled to a refund.
Issue/s:	The issue was to determine whether the ticket so issued was ‘an agreement of any memorandum of agreement’.
Arguments:	-The issue of a ticket by an airline operator neither constitutes an agreement nor a memorandum of an agreement. -The airline operator was not in contractual relations with the intended passenger until it provided him with a seat on the airplane.
Judgement:	In favour of the airline. - “it is enough for me to conclude that at the date of issue the ticket was not an agreement or any memorandum of agreement.”