

LAWS1150

Principles of Private Law

Comprehensive Course Notes

Contract Law | Property Law | Equitable Principles
UNSW Law and Justice

Course Overview

About This Course

LAWS1150 Principles of Private Law is a foundational law course introducing two of the most significant branches of private law: the law of contract and the law of property. Private law is concerned with the legal relations between individuals and legal entities, as distinct from public law, which governs the relationship between individuals and the state.

The course is divided into two broad parts. The first part (Weeks 1 to 4 and 9) focuses on contract law: the rules governing how legally binding agreements are formed, what obligations they impose and what happens when they fail. The second part (Weeks 5 to 10) introduces property law: the rules concerning the nature and extent of property rights, how property is acquired and transferred, and how the law resolves disputes between competing claimants.

Course Structure

Week	Topic	Domain
1	Nature of contract; theories of contract law; sources of contract obligations; agreement (offer and acceptance)	Contract
2	Consideration: essential elements, adequacy and sufficiency; past consideration; existing legal duty rule; part payment of debt	Contract

Week	Topic	Domain
3	Certainty and completeness; intention to create legal relations; preliminary agreements	Contract
4	Privity of contract: benefits and burdens; exceptions; circumventing the privity rule; statutory modification	Contract
5	Introduction to property; licences (bare, contractual, coupled with interest); extent of property rights; privacy	Property
7	Nature of property; fixtures and chattels; nemo dat; possessory torts (trespass, detinue, conversion)	Property
8	Adverse possession; Limitation Act 1969 (NSW); formalities for transfer of property; part performance	Property
9	Equitable estoppel: elements, types, effect; <i>Waltons Stores v Maher</i> ; estoppel as cause of action	Contract/Equity
10	Unjust enrichment and restitution	Contract/Equity

Week 1 -- Nature and Theory of Contract Law

1.1 What is a Contract?

A contract is a legally enforceable agreement. Four essential elements are required for contract formation: (1) agreement (offer and acceptance); (2) consideration; (3) certainty and completeness; and (4) intention to create legal relations. All four must be satisfied before a binding contract exists.

Contract law is one branch of the law of obligations -- the field of private law dealing with obligations owed by individuals and legal entities to one another. The other branches are tort and unjust enrichment. Contract is distinguished by the fact that its obligations are (at least in classical theory) voluntarily assumed through agreement, whereas tortious obligations are imposed by law. In practice, this distinction is less clear-cut: contract obligations are routinely determined on an objective basis regardless of actual intention, and tort obligations are sometimes voluntarily assumed.

1.2 Classical Contract Theory

Classical contract theory is the set of ideas underpinning the development of contract law in England and the United States during the 19th century. Two core ideas:

- The will theory: a contract represents an expression of the will of the contracting parties and should be enforced because of that. Contractual liability is therefore self-imposed.
- Freedom of contract: the philosophy of laissez faire held that individuals should be free to make whatever bargains they chose, and courts should give effect to those bargains with minimal interference. Encapsulated in Sir George Jessel MR's statement in *Printing and Numerical Registering Co v Sampson* (1875): 'If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.'

Two effects of the classical approach: first, non-contractual obligations (tort, restitution) were underdeveloped; second, contract principles were developed by reference to the overriding concern with giving effect to the intentions of the parties.

1.3 Criticisms of Classical Contract Theory

Classical contract theory has been comprehensively criticised on three grounds:

1. The will theory is fictitious. Courts determine whether a contract has been formed not by asking what the parties actually intended but by asking what a reasonable person would believe they intended, based on their words and behaviour. The objective approach means contractual liability is imposed by the state rather than self-imposed. Courts resolve problems arising from gaps and ambiguity by imposing their own assessment of what reasonable parties would have done.
2. Most contracts are not freely negotiated. Standard form contracts are the norm. The non-drafting party typically does not read, understand or have the opportunity to negotiate the terms. Unequal bargaining power allows one party to impose its terms on the other. This contradicts the idea that a contract represents the consensus of both parties.
3. The freedom of contract rests on a false premise. The power to bargain is founded on property rights, which are conferred and enforced by the state. Morris Cohen's analysis: every contract is a function of the

legal order, not of the will of the parties. Betty Mensch: 'ownership, or the right to withhold property, is a function of legal entitlement.' The distinction between 'free' and 'regulated' markets is therefore false.

1.4 Modern Theories of Contract Law

<p>Promise Theory (Charles Fried)</p>	<p>Fried argues in <i>Contract as Promise</i> (1981) that the moral basis for enforcing contracts lies in the binding nature of promises. A promise is a deliberate and voluntary act by which the promisor invites the promisee to rely on a commitment. When the promise is relied upon, the promisor has a moral obligation to honour it. Fried connects this to the Kantian principle of respect for persons as rational agents.</p>
<p>Reliance Theory</p>	<p>Reliance theories argue that the law should protect individuals who act in reliance on promises or representations. The case for enforcing contracts rests not on the will of the parties but on the harm caused by disappointed reliance. This theory provides the basis for equitable estoppel (examined in Week 9).</p>
<p>Efficiency Theory (Law and Economics)</p>	<p>Economic analysis argues that contract law should promote allocative efficiency. Contracts should be enforced because they typically represent mutually beneficial exchanges that increase total welfare. Contract rules should be designed to minimise transaction costs and encourage efficient exchanges. Breach of contract should be allowed where it is efficient, with damages calibrated to give the breaching party correct incentives.</p>
<p>Relational Contract Theory (Macneil)</p>	<p>Relational theories argue that discrete one-off transactions are atypical. Most contracts are embedded in ongoing relationships. Contract law should take account of the relational context rather than focusing narrowly on discrete exchange. This has influenced thinking about good faith obligations, cooperation in performance, and the implication of terms.</p>

1.5 Contract and Private Law

Contract is one branch of the law of obligations. Understanding how contract relates to other private law branches is important:

Contract vs Tort	Contract vs Unjust Enrichment
<ul style="list-style-type: none"> Contractual obligations: positive obligations to confer a benefit (pay money, deliver goods, perform services). Damages aim to protect the promisee's expectation interest. Tortious obligations: negative obligations to avoid causing harm. Damages aim to restore the status quo ante. Concurrent liability: a single incident can give rise to claims in both contract and tort (eg a professional who gives negligent advice may be liable for breach of contract and the tort of 	<ul style="list-style-type: none"> Unjust enrichment: a claim to reverse a transfer of value that was not contractually authorised or that occurred for a consideration that has since failed. Contract specifies what should happen between the parties. Unjust enrichment fills gaps when the contractual allocation breaks down. Example: if A pays B \$10,000 under a contract that is later void, A can recover the payment in restitution on the ground of unjust enrichment.

Contract vs Tort	Contract vs Unjust Enrichment
<p>negligence). The plaintiff may choose the more advantageous action.</p> <ul style="list-style-type: none">• Contract is strict liability: the promisor is liable for breach regardless of fault. Tort typically requires fault (negligence or intent).• Contract: promisee's reliance interest may be protected by limiting damages to expenses incurred in reliance on the contract.	<ul style="list-style-type: none">• Equity complements contract by providing remedies (specific performance, injunction) and doctrines (equitable estoppel, rescission for misrepresentation) unavailable at common law.

Week 1 -- Agreement: Offer and Acceptance

The existence of an agreement between the parties is typically analysed through the rules of offer and acceptance. These rules are an analytical tool -- they sometimes prove inconclusive or artificial. Where offer and acceptance cannot be identified, the 'acid test' is whether, viewed objectively, the dealings show a concluded bargain.

2.1 Offer

An offer is the manifestation of willingness to enter into a bargain, made in such a way as to justify the other person in understanding that assent to that bargain is invited and will conclude it. An offer must be distinguished from an invitation to treat, which merely invites the other party to make an offer.

Key Principles

- Offer vs invitation to treat: an invitation to treat does not constitute an offer capable of acceptance. Advertisements, catalogues and price lists are generally invitations to treat, not offers. Goods displayed in a shop are an invitation to treat: the customer makes an offer to buy by presenting goods at the counter.
- The language must be clear: words suggesting future negotiation ('may be prepared to sell', 'subject to contract') will typically negate an offer.
- An offer may be made to the world at large: a unilateral offer made in an advertisement can be accepted by anyone who performs the specified act.

Gibson v Manchester City Council [1979] 1 WLR 294 (House of Lords)

Facts: Manchester City Council wrote to Gibson saying the Council 'may be prepared to sell the house to you' at a specified price, and asked him to make a 'formal application to buy'. Gibson completed the application form. Before formal contracts were exchanged, control of the council changed and the scheme was abandoned.

Held: The letter was not an offer capable of acceptance. The words 'may be prepared to sell' were fatal. The invitation 'to make formal application to buy' made plain that no offer had been made. Lord Diplock (applying the conventional offer/acceptance analysis): the council's letter was 'a step in the negotiations for a contract which never reached fruition'. Lord Denning MR's approach (looking at the correspondence as a whole) was rejected as error.

Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256 (Court of Appeal)

Facts: The defendant placed newspaper advertisements offering £100 to anyone who used their smoke ball three times daily for two weeks and still contracted influenza. The plaintiff purchased and used the ball as directed and contracted influenza.

Held: Held: a contract had been formed. The advertisement was an offer to the world at large -- a unilateral offer capable of acceptance by performance. The deposit of £1,000 at the Alliance Bank showed sincerity in the matter. No prior communication of acceptance was required; completing the act was sufficient. Arguments that the promise was vague, that there was no consideration, and that no communication of acceptance was given were all rejected.

Pharmaceutical Society of Great Britain v Boots Cash Chemists [1953] 1 QB 401

Facts: Boots operated a self-service pharmacy. A customer selected a restricted drug from a shelf and took it to the cash desk. The question was whether the sale occurred when the customer took the item from the shelf (which would have required a pharmacist's supervision there) or at the cash desk.

Held: The display of goods on a shelf in a self-service shop is an invitation to treat, not an offer. The offer is made by the customer at the checkout. Boots was not therefore in breach of the pharmacy legislation because the pharmacist was present at the point of sale.

Mobil Oil Australia v Wellcome International (1998) 81 FCR 475

Facts: Mobil made a presentation announcing a loyalty program ('Circle of Excellence') for its petrol station franchisees. Wellcome (Lyndel) claimed this created a binding unilateral offer -- a promise of a 9-for-6 franchise extension -- which it accepted by meeting the required standards.

Held: The Full Federal Court rejected the estoppel claim but addressed the unilateral offer question. The 'speech' was too vague to constitute a specific promise of 9-for-6 extension. There was no 'one-for-one' or 'nine-for-six' assurance certain enough to ground an estoppel. The court also held that even if there were a sufficient promise, the detriment suffered by Lyndel was not disproportionate to justify the nine-year extension.

2.2 Acceptance

To form a contract, an acceptance must be made in response to the offer. The acceptance must correspond with the offer and must be communicated to the offeror (except where the offeror has dispensed with communication, as in unilateral contracts).

Key Principles

- Acceptance must be in response to the offer: in bilateral contracts, the nature of offer and acceptance usually ensures this. In unilateral contracts, the act must be done in reliance on the offer.
- Silence cannot be acceptance: an offeror cannot impose a contract by stating that silence will constitute acceptance (*Felthouse v Bindley*).
- Acceptance can be inferred from conduct: where conduct objectively manifests assent, a contract can be found even without express words of acceptance (*Empirnall Holdings v Machon Paull Partners*).
- Postal rule: where it is within the reasonable contemplation of the parties that the post might be used, acceptance is complete at the moment of posting, not when received (applies only to acceptance, not to offers, revocations, etc).
- Instantaneous communications: where parties communicate by instantaneous means (telex, fax, electronic communications), acceptance is generally complete at the place and time of receipt.

The Crown v Clarke (1927) 40 CLR 227 (High Court of Australia)

Facts: The government offered a reward for information leading to the conviction of the murderers of two police officers. Clarke, who had been charged with one murder, gave information that led to convictions. However, Clarke gave the information to clear himself of the murder charge, not in response to the reward.

Held: Held (Isaacs ACJ, Higgins J, Starke J): Clarke was not entitled to the reward. Acceptance requires that the act be done in response to the offer and in reliance on it. 'Acceptance is essential to contractual

obligation, because without it there is no agreement.' Clarke's admission was made purely to save himself from the murder charge, not with reference to the offer of a reward. The prima facie presumption that a person who knows of an offer and performs its conditions has accepted it was rebutted on the facts.

Felthouse v Bindley (1862) 11 CB (NS) 869

Facts: The plaintiff wrote to his nephew offering to buy his horse, adding: 'If I hear no more about him, I shall consider the horse mine at £30 15s Od.' The nephew intended to sell but did not reply. The auctioneer accidentally sold the horse.

Held: Held: no contract. Silence cannot constitute acceptance. The offeror cannot impose a contract on the offeree by stating that silence will be treated as acceptance. There was no evidence of acceptance communicated to the plaintiff: the nephew's uncommunicated intention to accept was irrelevant.

Empirnall Holdings v Machon Paull Partners [1988] 14 NSWLR 523

Facts: The respondent architects sent a standard form contract to the appellant. The appellant used the respondent's services without signing the contract. The question was whether the unsigned written terms had been incorporated.

Held: Held: a contract had been formed on the terms of the written document, even though it had never been signed. The appellant's conduct -- continuing to commission services with knowledge of the written terms -- constituted acceptance by conduct. Acceptance can be implied from a party's acts even when there are no express words of agreement.

Brinkibon v Stahag Stahl [1983] 2 AC 434 (House of Lords)

Facts: The buyers in Vienna telexed acceptance of an offer in London. The question was where the contract was formed (relevant to jurisdiction).

Held: Held: where instantaneous means of communication are used, a contract is formed at the place and time where acceptance is received. Lord Wilberforce: the postal acceptance rule should not be extended to telexes. No universal rule covers all situations; the matter is one of construction and implication depending on the circumstances and commercial practice.

Brambles Holdings v Bathurst City Council (2001) 53 NSWLR 153

Facts: The Council and Brambles had a long course of dealing involving waste disposal. No formal written contract was signed. The question was whether a binding contract had been formed.

Held: Heydon JA: where the traditional offer/acceptance analysis cannot be applied, it is relevant to ask: (1) whether in all the circumstances an agreement can be inferred; (2) whether mutual assent has been manifested; and (3) whether a reasonable person in the position of each party would think there was a concluded bargain.