LPAB 04 Contracts study notes

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INTRODUCTION

Definition:

Definition of Contract Law - hard to adequately define – two definitions provide a general idea:

- A promise or set of promises that the law will enforce – Federick Pullocks.
- Two problems with this:
  - Only promises in a contract are enforceable. But this is not the case. Some, promises not set out in a contract may be enforceable pursuant to equity and estopple.
  - Oral and verbal promises are not enforceable in this definition.
- A contract is an agreement giving rise to obligations which are enforced or recognised law – Prof Tritel – based on the agreement of contractual parties (distinguished from torts law)
- Problems
  - Law takes an objective view rather than a subjective view on whether the contract exists.
  - Not all agreements are contracts. There needs to be an intention that your agreement is legally binding.
- In general:
  - Existence of an agreement and supported by consideration
  - Promises are not kept automatically enforced and contracts are not self-enforcing – hence courts and legislation

Significance of contract law:

- Central to how society operates. We are constantly involved in contractual dealings.
- Robert Reich – Saving Capitalism – the operation of market economy is based on 5 key issues
  1. Property – what can be owned (and for how long i.e. patents)
  2. Competition – the degree of market power a business can have
  3. What can be bought and sold and on what terms?
  4. Bankruptcy/liquidation – what happens when a person/business cannot pay its debts?
  5. Enforcement + remedies – how do you ensure that no one cheats on the above four? Court apply an objective view re whether the agreement exists
- Reich argues that the economic power of corporations is significant and needs countervailing forces (political process, legislation, courts) to ensure things are resolved in a fair and equitable manner.
- Freedom of contract – parties enter into it on whatever terms they wish. This us at the heart of contract law and courts are reticent to develop and apply principles that impinge freedom. That said 'freedom' is not always present or equal so things like relative power is taken into consideration.
- To what extent will courts enforce restraints of trade clauses? i..e non-compete clauses. Courts can enforce but will not always enforce restraint of trade clauses. These clauses may not always be deemed valid/lawful.
- Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd [1894] AC 535. Sets out the rules for whether a restraint of trade clause will be valid (enforced) or not.
  - Is it reasonable between the parties? Majority of cases are decided here.
  - Is it reasonable to the public as a whole? Baker et al. v. Lintott, (1980) 25 A.R. 512 (QB)
- Foundational role in law as a whole. One of the two bases of legal obligations (Torts and Contracts). Differ on the source. In Contracts, legal obligation is imposed by agreement, whereas in Torts, legal obligations are imposed by law i.e. negligence, trespass etc

Sources of Contract law:

1. Common law – primary source – Courts. English history following Norman Conquest.

2. Equity – contributed to common law and the gaps in the law. Chancellery developed the law of specific performance as a remedy to the deficiency of common law which only allowed the recovery of damages for a breach of contract (would that remedy be unconscionable?) .
3. Legislation – prevails over any conflicting equity or common law. (Legislation > equity > common law). Parliament will make more fundamental change, courts will make incremental change. Eg industrial relations law.
    - Largely governed by common law in Australia, especially in NSW. It is also developed domestically or inherited from England with some legislative additions:
        - Competition and Consumer Act 2010 (Cth) – Australian Consumer Law
        - Sale of Goods Act 1923 (NSW)
        - Contracts review Act 1980 (NSW)
        - Frustrated Contract Act 1978 (NSW)
        - Civil Liability Act 2002 (NSW)

Overview of topics covered in course

Formation of a contract

- Elements:
    1. Existence of an agreement which is sufficiently certain and complete
    2. Presence of consideration (the promise)
    3. Parties of the agreement intended it to be legally enforceable/binding

    Contract – is there a contract? (wks 1 – 4)
    Term – what are the terms of the contract? (wks
    Breach – particularise what terms are in breach (wk 9 onwards)
    Damages (wks 11 – 12)
- Other important factors:
    1. Whether the parties have the capacity to enter into a contract (age is the most significant factor)
    2. Legality
    3. Whether the contract has to be in writing

Terms of contact

- Two broad categories
    1. Express terms (expressly or consciously included in the contract); or
    2. Implied terms (terms that are incl. or implied even though they were not consciously or expressly included in the contract)
- Construction/interpretation of contracts – Courts/means of interpreting the contracts (i.e. terms, exclusion clauses etc)

Privity of contract

- The rights of persons (third parties) who are not parties to a contract but stand to get a benefit from it.
- Rights will depend on the exceptions to the doctrine of privity.

Veracity of a contract

- Circumstances in which a part will have rights to get out of a contract it has entered into due to some defect in the consent given when entering the contract e.g., entering a contract under duress.
- Contract can be set aside or rescinded. Contract could be void from the beginning i..e ot never existed. Vitiating factors give the 'victim' to get out of the contract.
    - Under common law - misrepresentation, mistake, duress,
    - equitable law principles undue influence, and unconscionability.
    - Legislation (mainly ACL): Misleading or deceptive, Unjust contract + two more

- **Unenforceable** – all aspects are valid but can't be enforced because of one or either of the parties can't provide evidence of the contract i.e. absence of writing where it's required by statute
- **Illegal** – contrary to public policy at common law i.e. contract to kill

Formation of a contract

- Concerned with a number of elements or issues. Contract must conform with all of these rules to be valid.
    - Offer
    - Acceptance
    - Certainty and completeness
    - Consideration
    - Intention to create legal relations
    - Requirement of writing (not always required)
    - Capacity (NOT assessed)
        - Parties must have contractual capacity – vulnerability to exploitation, e.g. mental disorder (void, except for necessities), intoxication, bankrupts (limited ability to contract), the crown, minors (can contract for necessities), companies (legislation gives company power to contract).
    - Legality (NOT assessed)
        - Illegality deals with criminal contract conduct prohibited by statute and that contrary to public policy
- A court will look at the whole course of the negotiations to determine if there is a contract
    - Agreement has to be one of consideration
    - Parties must intend to create legal affect
- Once contract is established any further negotiations about the contract cannot alter or end the contract unless all parties agree to it

Have parties entered into an agreement?

- Whether parties intended to contract is an **objective test**
- **Requirement of objectivity case of *Smith v Hughes:***
    - Simply, if a reasonable person would assume the parties intended to contract.
- Where there is a dispute about whether a contract was in existence need to look at the rules of offer and acceptance.
    - Look at negotiations between the parties to ascertain whether one of them (offeror) has made an offer to the other (offeree) and whether the offeree has accepted.
    - For an agreement to arise – the offer and acceptance must precisely correspond and any departure from the terms means the acceptance/offer is ineffective.
    - When and where the contract was entered into – when relates to performance of contractual obligations (acceptance is date entered into) and where relates to if they parties are in different legal jurisdictions. i.e. if it is entered into in NSW, NSW law and courts will apply (although generally they are uniform across Australia with some exceptions i.e. unjust contract is NSW specific)
- Court can also determine if agreement to contract exists outside of offer and acceptance if it is unrealistic to apply this rule.