

A. INTRODUCTION

A case is in addition to an authority for a principle, apply the case

Distinction between certainty and justice
In commercial law, certainty counts

Privity of contract, only involves the people who are party to the contract

What is the objective theory of contract? ©1-40ff

- Voluntary assumed situations
 - Debt arises when you have an unconditional obligation to pay a sum of money
 - Can't sue you for money if you have not paid but not received the good, this would be an action in debt and there must be an unconditionally obligation to pay for money only once you receive the good
 - The traditional way to do it -action in debt is not contractual in nature, its proprietary in nature (an action against a sum of money)
 - Can only sue for a breach if you have actually performed
 - A contract is a legally binding promise or agreement
 - The person who makes a promise is the promisor and the person to whom the promise is made is a promisee
 - Contracts can be formed in two ways
1. make an offer in return for an act (an offer in return for an act - **unilateral**) (I will pay you when you mow my lawn)
 2. **Bilateral** contract - formed by an exchange of promises (e.g I promise to pay you if you promise to mow my lawn, then there is a contract)
- Deed is a contract that is expressed in a sealed instrument
 - The rest of contracts are noted as simple contracts and must be supported by consideration
 - A deed does not need to be supported by consideration to be enforceable
 - A simple contract may be wholly written, wholly oral or partly written and partly oral
 - Consideration is required even if the contract is written
 - If there is only one promisor the contract is unilateral
 - A unilateral deed is termed a deed poll it is not a contract
 - The most common type of contract to come before the Australian courts have been conveyancing transactions
 - Australian contract law has been applied and developed mainly in the context of contracts for the sale of land and leases

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

©1-21-1-25; 1-28; 1-39.

- (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.

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.

(i) Why enforce contracts?

(ii) **Capacity**

- contract law assumes the existence of parties capable of voluntary agreement
- At common law the general rule is that any contract made by a minor was voidable
- Unless made during a lucid interval a contract made by mentally disabled person with a person who knew or ought to of known of disability is voidable
- The contractual capacity of intoxicated being is similar to that of mentally disabled
- The crown can not contract with the citizen
- At common-law married women generally had no contractual capacity
- *Minors - Minors (Property and Contracts) Act 1970 (NSW)*
- *The Crown - Judiciary Act 1903 (Cth)* made the crown a possible defendant

(iii) **Public Policy and Illegality**

(a) There are many heads of public policy considered by courts in relation to contracts. The following list is not closed, as courts could create new heads: contracts to commit a legal wrong, contracts injurious to public life, immoral contracts, contracts in restraint of trade, contracts injurious to foreign relations, contracts prejudicial to the status of marriage, contracts purporting to oust the jurisdiction of the courts and contracts prejudicial to the administration of justice. If contracts infringe some types of public policy, the contract will be considered illegal (e.g. contract to commit a legal wrong), whereas other contracts or clauses will just be unenforceable or void (e.g. in restraint of trade).

(b) Immoral Contracts - Marriage and Sexual Morality

* **Andrews v Parker [1973] Qd R 93, ©27-30** *in pari delicto* -of equal wrong

- The plaintiff, a 55 year old widower, met the defendant who was about 41 years old
- A de facto relationship commenced in 1968 and they lived together and were known as man and wife
- In August in response to pressure from the defendant the plaintiff agreed to transfer title to his house to the defendant
- This was subject to 3 conditions
 - Plaintiff would have a place to live for The rest of his life
 - The defendant would leave the house in her will to the plaintiff's children
 - If she went back to her husband the defendant would deed the house back to the plaintiff
- The plaintiff signed a document transfer the title to the defendant
- Although there was a consideration of \$6000 defendant paid nothing
- In February 1969 the defendant said her husband was coming to live in the house and asked when the plaintiff would leave

- The defendant offered to pay \$4000 in \$10 instalments but no money was ever paid
- The plaintiff later went to live in south Australia
- The plaintiff sued to recover title to the house
- It is said that an agreement to do an act that is illegal or immoral or contrary to public policy is unlawful and therefore void
- Although they were living out of wedlock this agreement was not purposed to bring about the immoral cohabitation but to provide for what was to happen upon its ending
- Judgement was given for the plaintiff

contra bonos mores - against good morals

(c) 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.

Some agreements that restrict competition are prohibited by the Competition and Consumer Act 2010 (Cth), irrespective of whether or not those agreements would be enforceable at common law.

A. OFFER AND ACCEPTANCE

Ad idem of the same mind, that is, in agreement

Consensus ad idem Consensus to the terms that are in the agreement

Invitation to treat An invitation for a person to make an offer

Nudum pactum An agreement which is not binding because it is not supported by consideration

Puff an extravagant statement not intended to be taken seriously

Tender an offer made in response to an invitation to make it

Quid pro quo something for something

- Postal acceptance rule does not apply to revocation of offers in a letter see *Stevenson Jacques and Co v McLean* (1880)
- In determining whether an offer has been made, the crucial issue is whether it would appear to a reasonable person in the position of the offeree that an offer was intended and that a binding agreement would be made upon acceptance.
- Postal acceptance rule is said to apply in cases where parties must have contemplated that acceptance might have been sent by post *Henthorn v Fraser* [1892] 2 Ch 27
- For electronic communication, acceptance is effective once received by the offeror *Reese Bros Plastics Ltd v Hamon-Sobelco Australia Pty Ltd* (1988) 5 BPR 11, 106.

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

(i) Offer (an expression of willingness to contract on the terms stated)

How do you distinguish between an invitation to treat, provision of information, a declaration of intention and an offer?

- The acceptance of an offer is the act which completes the formation of the contract
- Until acceptance there is nothing but a revocable offer which binds nobody
- The formation of contract is a process which creates legal obligations