Contract

Wednesday, 30 July 2014
2:56 pm

Principles of Contract Law (Paterson, Robertson & Duke) [1.10 - 1.15]

Classical Contract Theory

The philosophy underlying classical contract law:

- significant areas of Australian contract law are still based on classical principles.
- law of contract that developed in 19th century influenced by will theory of contract.

will theory:

- contract represents expression of the will of the contracting parties and thus should be respected and enforced by courts.
- heart of the theory is notion that contract involves self-imposed liability.

- 19th century prevailing ideology was liberalist philosophy of laissez-faire - contracts were consistent with that philosophy. parties regarded as self-interested individuals who created own private law through agreement. individuals thought to be free to enter into whatever bargains they considered would benefit and courts should facilitate that freedom by enforcing whatever bargains individuals chose to make... otherwise courts should interfere as little as possible.

freedom of contract was starting point for determination of all contract law issues.

- Jessel: political/social context thus favoured individualism, self-reliance, free will... principles of modern contract law founded on these.
  - labelled 'contractualism' (Cohen)
    - 'all restraint is evil... government is best which governs least... there is a pre-established harmony between the good of all and the pursuit by each of their own selfish gain.'
  - two effects:
    - courts reluctant to recognise existence of non-contractual obligations... placed restraints on enforcement of promises that did not form part of bargain/exchange between parties. principles seen as objective/neutral... thus no room for any requirement of fairness or imposition of contractual obligations without consent of parties.

contract law sharply separate from tort, in which obligations imposed on individuals.

Criticism of the classical approach:

- rights and obligations arising from a contract do not necessarily represent the will of the parties.
- many problems arise as result of what parties have not expressly agreed upon, rather than what they have agreed upon... courts resolve problems by determining rights/obligations of parties on objective basis.

- courts not concerned with whether parties intended to enter a contract, but concerned with whether a reasonable person would believe they intended to, based on words and behaviour.
- content of contract determined objectively: statements made during negotiations may be part of contract if reasonable bystander would think contractual promise was intended, and unsigned written terms form part of contract if reasonable notice of terms was given by one party to other.
- the state imposes obligations on parties based on norms of reasonable behaviour.

- classical approach assumes contracts are fully negotiated between parties... the widespread use of standard forms undermines the idea that a contract necessarily represents a consensus between parties. if the bargaining power is unequal that one party able to impose their standards on another, then resulting contract is unlikely to represent will of both parties. Classical notion of individuals freely bargaining does not take account of standard form contract or unequal distribution of economic power.

- another problem is role played by state enforcing contracts and establishing legal framework in which bargaining takes place... a contract is only binding because the states will enforce it... freedom of contract is not matter of letting parties do their own thing. every contract is a function of the legal order rather than individual will of parties.

Principles of Contract Law (Paterson, Robertson & Duke) [2.05 - 2.70]

The Concept of Private Law and the place of Contract Law within it:

- consider contract law's place within the law of obligations: law of obligations is concerned with obligations owed by individuals to one another. comprises fields of contract, tort, restitution etc.
- contractual obligations may be imposed on both parties by state or by one party on another.
- law of obligations = concerned with 'obligations placed on particular persons.'
- law of property = concerned with 'obligations imposed generally on all members of society.'
• the relevant legal rights are ‘private’ in that they are exclusively enforceable by the individuals who are recognised as holders of the rights.
• contract overlaps with other parts of law - particularly tort, unjust enrichment, equitable doctrines and statutory obligations.

Tort:
• described as 'civil' wrongs because they are enforceable by the person, not the state.

**Contract Law Cases and Materials (Paterson, Robertson & Duke) [2.05 - 2.20]**

The Place of Contract Within Private Law:

The distinction between voluntary and imposed obligations:

• fundamental distinction has been that between obligations which are voluntarily assumed, and obligations imposed by law (tort).

  - obligations voluntarily assumed = the law of contract.
  - private autonomy came to be abused by parties with greater bargaining power

The paradigm of modern contract theory:

• when the contract is made it binds each party to performance or to a liability to pay damages in lieu. these damages will represent the value of the innocent party's disappointed expectations.

  - model where contract is a bilateral executory agreement...

  - consists of exchange promises carried by process of offer and acceptance, with intention of creating a binding deal.

  - the model is suffused with the idea that the fundamental purpose of contract law is to give effect to the intentions of the parties.

  - the role of free choice on the part of contracting parties has declined.

  - the pervasiveness of this model is attested by the closely parallel set of ideas and values about promises.

• Intentions rather than actions:
  - classical model assumes contract law is fundamentally about what parties intend, not what they do.
  - classical theory assumes contractual obligations are created by intentions of parties and not by their actions.
  - it is the manifestation of intention - not actual intention - that matters most... and what parties actually do is important in measuring extent to which performance falls short of promise.
  - classical model concerned with forward-looking planning... thus contractual obligations differ from tort law etc.
  - it is the intention of the parties which must necessarily precede the causing of the damage or rendering of the benefits, and which is thus the source of the obligation.

• Contract as a thing:
  - contract has some kind of objective existence prior to any performance.
  - anticipatory repudiation: promise can be treated as 'broken' even before its performance is due.

• Deterrent role played by courts:

  - classical Contract model presupposes an important role for courts to encourage the citizenry to comply with socially desired standards of behaviour.
  - the importance of the deterrent function has declined at the expense of the dispute-settlement function.

  - A single model of contract:

    - presupposition that there is indeed one model.
    - faith in the generalising effect of the concept of Contract.
    - model is based on the free market economic model.

**Defects** in the classical model:

• A single model of contract: there is no such thing as a typical contract.
  - modern society has rejected the values of the market outside the increasingly narrow area in which the market is permitted to operate. The classical model thus continues to exist with increasingly little content

• The voluntary assumption of contractual obligations:
  - the power of the classical model derives largely from its stress on the executory contract.

    - executory contract: two parties exchange promises and a binding legal obligation is then into existence, and the obligation is created by the intention of the parties... if they have done nothing to implement the agreement then the obligation cannot arise.

    - however, wholly executory contracts are rare in practice and less binding than the classical model would suggest.

    - it is because the classical model defines Contract in terms of executory transactions that it necessarily locates the source of contractual liability in what parties intend to do rather than what they do.

    - but contracts are regularly made in which making and performance are simultaneous (boarding the bus)... i.e. intention and action coincide (?).

    - in the classical model it is the intention or agreement or promise which is source of liability and not the consideration...

    - thus a man who borrows $100 is liable to repay it because he has promised.

• The importance of benefits rendered and detrimental reliance:
**detritual reliance:** is it not manifest that a person who has actually worsened his position by reliance on a promise has a more powerful case for redress than one who has not acted in reliance on the promise at all? the rendering of benefits and actions of detrimental reliance can give rise to obligations even where there was no promise at all.

- the law of quasi-contract is concerned with situations where one party is entitled to recompense for benefit rendered to another even though latter made no promise to pay for it... rendering of a benefit is thus sometimes grounds for liability even without an agreement/promise.

- the use of objective tests:
  - it is the appearance of intent that matters... actual subjective intent is irrelevant.
  - when a person is bound by a promise contrary to his actual intent/understanding, the liability is based not on some notion of voluntary assumption of obligation... usually in reasonable reliance (one party relies on a reasonable construction of an offer).
  - the truth is he is bound not so much because of what he intends to do but by what he does.
  - that is to say obligations will arise whether benefits are rendered or actus of reasonable reliance take place.

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**Agreement: Offer [1B]**

Friday, 1 August 2014

**11:53 am**

**Contract Cases and Materials (Paterson, Robertson & Duke) [3.05 - 3.75]**

**AGREEMENT**

- four essential elements for contract formation: agreement, consideration, certainty and intention to create legal relations.
- existence of an agreement is analysed through rules of offer and acceptance.
  - however, these rules are merely an aid... a contract can be made without an offer and acceptance, provided there is mutual assent.
- the ‘acid test’ in a case where offer and acceptance cannot be identified is ‘whether, viewed as a whole and objectively from the point of view of reasonable persons on both sides, the dealings show a concluded bargain.’ (Meates v Attorney-General Cooke J)
- Heydon J concluded in *Brambles Holdings Ltd v Bathurst City Council* [2001] that in circumstances where traditional approach cannot be applied it is relevant to ask:
  - whether in all circumstances an agreement can be inferred;
  - whether mutual assent has been manifested, and
  - whether a reasonable person in position of each of parties would think was a concluded bargain.

**Offer**

**Gibson v Manchester City Council** [1979]:

- [Tenants buying homes - trial judge held there had been offer & acceptance, so binding contract... Council appealed.]
- Lord Diplock:
  - *Gibson* (Diplock): corporation never made a contractual offer, therefore there was no acceptance.

**Carlill v Carbolic Smoke Ball Company** [1893]

- [Influenza cure]
- *Lindley LJ:*
  - *Carbolic Smoke Ball* (Lindley): all elements of contract present... performance is acceptance of the continuing offer.
- there is a direct inconvenience to any person who uses the smoke ball... thus there is ample consideration for the promise.
- *Bowen LJ:*
  - *Carbolic Smoke Ball* (Bowen): offer is made to the world but the contract is made with those who perform the condition.
  - consideration:
    - there is a request to use involved in the offer.
  - consideration:
    - 'any act of plaintiff from which defendant derives benefit or advantage, or any labour, detriment, or any inconvenience sustained by plaintiff, provided such act is performed or such inconvenience suffered by plaintiff, with consent, either express/implied, of defendant.'
    - inconvenience is enough to create a consideration... it is consideration enough that plaintiff took trouble of using smoke ball... also the defendants received benefit from user, for use of smoke ball was contemplated by defendants as being indirectly a benefit to them because use would promote their sale.

**MacRobertson Miller Airline Services v Commissioner of State Taxation (WA) (1975)**

- [airline ticket -]
- *Barwick CJ:*
  - *MacRobertson* (Barwick): ticket not an agreement.
Offer distinguished from invitations to treat:

Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) [1953]
- [Pharmacist]
- Somervell J: Boots (Somervell): contract not completed until shopkeeper accepts offer.
- Birkett J: Boots (Birkett): offer is actually made by customer to buy... must be acceptance by shopkeeper.

Revocation of an offer:

Goldsbrough Mort & Co v Quinn (1910)
- Griffith CJ: Goldsbrough Mort (Griffith): a consideration for the promise makes it binding.

  all agreements consist of offer made by one party and accepted by the other.
  - the offer and acceptance may be contemporaneous, or offer may be made under such circumstances as to be regarded as a continuing offer subsisting at moment of acceptance. At that point there is a contract.
  - a promise to leave the offer open for a specified time makes no difference because there is no agreement, and the promise - if without some consideration - is not binding.

  if there is a consideration for the promise - as in this case - it is binding.

  the real transaction is not an offer accompanied by a promise, but a contract for valuable consideration to sell the property upon condition that the other party shall within stipulated time bind himself to perform the terms of offer embodied in contract.
  - the nature of the consideration is not material.
  - if the only promise was a promise not to withdraw the offer... they could be compensated for breach. appeal allowed. (contract exists - no revocation).
- O'Connor J: Goldsbrough Mort (O'Connor): two interpretations of document... withdrawal of offer was breach either way.
- Isaacs J: Goldsbrough Mort (Isaacs): the option ensures continuance of the offer and forbids the offeror retracting it.

  this contract is known as an option; consists of promise founded on valuable consideration to sell land within given time.
  - unsupported by valuable consideration the promise would be nudum pactum (not binding) and could be withdrawn.
  - if accepted with stipulated conditions, no attempted withdrawal having taken place, contract formed. (Bruner v Moore).

  Bruner v Moore: 'the option, which is given for value and is, therefore, not revocable.' the whole question turns on the point of irrevocability of the option.

  the feature which distinguishes an option from a mere offer is consideration. However that does not alter the nature of the offer, it merely ensures its continuance by creating a relation in which the law forbids the offeror retracting it.
  - he has parted with the right to alter his mind for the period limited.. offer must therefore stand.
  - the consequence is that the offer was not withdrawn, and when linked with the acceptance, the necessary mutual obligation to sell/purchase the land on stipulated terms was created.
  - the parties have entered into two separate contracts.
  - first was a unilateral contract that certain offer should last a week... the appellants had no obligation beyond the consideration and the respondent had none but to continue the offer for the stipulated time... the promise implied an undertaking not to sell to another... but in absence of any such attempt the remedy was in appellants' hands. They could at any moment before expiration of period agreed on, by acceptance, convert their position from optionees to vendees.

Unilateral contracts:

Mobil Oil Australia v Wellcome International (1998)
- [Franchisees incentive scheme]
- Court: Mobil (Court): although unilateral contracts are different, no reason to believe they promised not to revoke the offer.

  contractual issues:
  - (there was an address made by the Mobil GM)
    an offer of a promise to 'find a way' to 'extend (for an unspecified period)' is too vague and uncertain to be capable of giving rise to contractual obligation.
    the problem remains for the franchisees' case in contract, that neither the terms of speech nor those of tear-off slip were sufficiently certain to give rise to contract.
  - revocation of offer:
    a unilateral contract is one in which the act of acceptance of offer is also an executed consideration for promise offered. The act of acceptance called for by the offer, once completed by the offeree, leaves the contract executory only on the part of the offeror.
    - e.g. offer for reward for return of lost goods.
    the proposed nine-for-six promise was the offer of a reward (9 years free tenure) in return for an act.