



Principles of Common Law

Contract law – Part 2

Privity, Vitiating Factors, Breach, Termination and Remedies

Principles of Common Law

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Lecture 9

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Lecture 7:

- 1. Role of Contract Law**
- 2. Formation and elements**
- 3. Consideration and estoppel**
- 4. Contract terms**

Lecture 8:

- 5. Privity and third party rights**
- 6. Vitiating factors**
- 7. Breach and termination**
- 8. Remedies**

Readings

Mandatory: Geldart, chap 6 &

Gordley, Introduction to Philosophical Origins of the Contract Doctrine

Additional readings on website



Contract Law – related concepts & recap

- Caveat emptor
- Doctrine of good faith
- Doctrine of unjust enrichment
- Parties are responsible for making their own agreement
- Illegality of the contract
- Public policy – foreign illegality
- **Gordley – Philosophical origins of the doctrine of contract**



Statutory Contract Law

- **US** - Uniform Commercial Code - UCC's original articles adopted in nearly every state, represents a body of statutory law that governs important categories of contracts.
- Eg – Article 1 (General Provisions) and Article 2 (Sales). Sections of Article 9 (Secured Transactions) govern contracts assigning the rights to payment in security interest agreements.
- Contracts related to particular activities or business sectors may be highly regulated by state and/or federal law.

- **UK** – Statute regulates on certain types of contracts.
- Eg – Sale of Goods Act 1979, Consumer Rights Act 2015
- Also note: Unfair Contract Terms Act 1977



Contract law – scope of liability

- Freedom of contract:
 - The liability is ‘fixed by the agreement of the parties concerned’
 - Contracts may override many of the duties in certain other areas of law (such as Tort Law)
- Statutory law may require some contracts be put in writing and executed with particular formalities (agreements to purchase land...)
- Otherwise, the parties may enter into a binding agreement without signing a formal written document. UK law accepts oral contracts.
- Principles of the US common law of contracts outlined in the Second Restatement of the Law - Contracts, publ. American Law Institute.



Privity and rights of third parties

- Privity – only persons who are parties to the contract are entitled to take action to enforce it.
- Under general common law, a person who stands to gain a benefit from the contract (third party beneficiary) is not entitled to take any enforcement action if they are denied the benefit.
- Exception: Contracts (Rights of Third Parties) Act 1999
 - s. 1(1) – a third party may enforce a term of the contract if
 - a) the contract expressly provides that he may
 - b) the term confers a benefit on them
 - s. 1(2) – this does not apply if it appears that the parties to the contract did not intend the term to be enforceable by the third party.
- Circumventions of the doctrine: collateral contracts, assignment, agency



Vitiating factors

- Cripple the wholesomeness of the contract
- Inherent problem with the way the contract came about or destroys the basis of the agreement
- Vitiating factors make the contract either:
 - **Void** (*ab initio*) – null, without legal force or legal effect from the moment it is created; to be treated as invalid from the outset; any benefits must be restored back but no lawsuit right for damages = as if the contract never existed

or

 - **Voidable** – unenforceable but still a valid agreement until avoided; aggrieved party can claim damages from wrongdoer



Mistake (1)

- Three types of mistake:
 - Common mistake – both parties make the same mistake
 - Mutual mistake – parties are at cross purposes
 - Unilateral mistake – only one party is mistaken
- Must be operative enough to make the contract **void ab initio**
- No property will pass, parties must be restored to their situations before the contract (incl. damages)



Mistake (2)

| Common mistake | Mutual mistake | Unilateral mistake |
|---|--|--|
| <ul style="list-style-type: none">• <u>Res extincta</u> – the subject-matter of the contract no longer exists• <u>Mistake as to quality</u> – renders the subject-matter essentially different to what it was believed to be | <p>Parties are at cross-purposes</p> <p>Eg: Contract to sell A's 'bike' to B</p> <p>A meant bicycle B meant motorcycle</p> <p>Objective test to see if the contract can be saved</p> | <ul style="list-style-type: none">• Mistake as to the <u>terms</u> of the contract• Mistake as to <u>identity</u> – A thinks they are contracting with B when in fact it is a rogue R. <p><i>Next slide</i></p> |



Mistake (3)

Unilateral mistake as to identity – usual scenario

- Original seller S thinks he is contracting with B but actually it is a rogue R pretending to be B to free ride on B's commercial reputation
- R pays S with a bad cheque and takes the sold goods (car)
- R sells car to innocent third party 3P for cash
- R's cheque to S bumps. S wants car back. R disappears.

- Standard case: S v 3P – court's decision whether mistake or not
- If mistake: original contract between S and R **void** → property did not pass → R never had the property of the car → *nemo dat quod non habet* → 3P must give the car back to S. 3P can only sue R but he is gone.
- If no mistake: original contract voidable → valid until avoided → usually not avoided by S unless catches R (rare) → property passes from S to R to 3P → 3P keeps car. S can only sue R but he is gone.



Misrepresentation (1)

- False statement of fact or law by the representor which induces the representee to enter into the contract
- Three types of misrepresentation:
 - Innocent
 - Fraudulent
 - Negligent (cf. Misrepresentation Act 1967)
- **Effect: contract voidable** – contract exists but may be set aside (avoided) by the representee
- Remedy usually rescission or damages
- Requirements:
 - False statement of fact or law, not opinion
 - Inducement / reliance



Misrepresentation (2)

- Rescission – unmaking of the contract between the parties to bring them back to the position they were in before the contract
 - Equitable remedy – not an absolute right but subject to bars:
 - Affirmation by the plaintiff when finds out about misrep
 - Lapse of time – not rescinded within a reasonable time
 - Restitution impossible
 - Third party has acquired rights that stop the P from rescinding the contract
- cf. mistake – if no mistake, usually misrepresentation of identity and the seller loses the car and can only claim against the rogue (vanished)
- Otherwise damages: usually compensatory for loss suffered
 - Sometimes you can get rescission + additional reliance damages



Duress

- Duress – illegitimate violence or threats to the person, their family or property, which was a factor inducing them to enter into the contract
- Absence of free will, vitiating of consent
- Blackmail is only accepted on policy grounds (public security...)
- Analysing the pressure the victim was under:
 - Pressure exerted in good faith / legitimately (mortgage repayment)
 - Existence of realistic alternative
 - Protests of the victim
- **Effect: contract void**
- NB: Unfair Commercial Practices Directive (Directive 2005/29/EC of 11 May 2005)



Undue influence

- Actual undue influence almost the same in law as duress (above)
- Presumed undue influence:
 - There is a presumption that influence has to be exercised but does not become *undue* unless there is something suspicious of which calls for an explanation on the facts:
 - Size or Nature of transfers
 - Transaction can only be explained by undue influence.
 - Nature of the relationship determines “trust and care”:
 - Bank manager and customer (eg. Goldman Sachs case)
 - Employer and employee
 - Elderly gentleman and great nephew re. property ...

–**Effect: contract voidable**



Illegality

- Certain contracts forbidden by statute (e.g.: it is illegal to trade with the enemy at war)
- Others are illegal at common law:
- Contract to commit an offence – never enforced by a court (will never force a party to commit a crime)
- An illegal contract cannot be enforced by a guilty party
- But does not prevent them from recovering damages if the other party's breach constitutes a tort in itself (not just breach of contract)
- Contracts prejudicial to public safety or the administration of justice or restrictive of free marriage will also not be enforced



Discharge of the contract

- Discharge by performance
- Discharge by termination
- Discharge by frustration
- Discharge by breach



Frustration

- A contract may be discharged by frustration
- Change in the circumstances of the contract after it has been made – makes it impossible to perform the contract or deprives the contract of its commercial purpose
- Usually war, natural disasters, destruction of the object, or when it becomes illegal to perform the contract
- Fault of neither party
- Could not have been predicted at the time of signing
- Each party is discharged of all future obligations
- Neither party can sue for breach
- Allocation of loss: Law Reform (Frustrated Contracts) Act 1943



Breach

- A binding agreement is not honoured by one of the parties
- Usually entitles to compensatory damages to put the plaintiff in the position he would be in had the breach not occurred
- The outcome and availability of remedies depends on the type of contract term that was breached. Breach of a warranty entitles to damages only – breach of a condition entitles to damages and termination (cf. slide on terms)
- Anticipatory breach: a party may terminate the contract and claim damages before performance is due or a breach occurs if there is an indication to abandon the performance of a contract (called repudiation).
- Affirmation of a contract: when the injured party wants to keep the contract alive despite the other's anticipatory breach (then only entitled to compensatory damages for the breach)



Economic loss rule

- Only recover damages arising from breach of contractual obligations, indecent conduct or defiling property (ie., trash heap).
- Excludes recovery of damages/compensation from breach of other private law obligations
- Some jurisdictions allow plaintiff to recover cumulative damages from other breaches of regulatory or tort or property law arising from a breach of contractual obligation.
- In English law, no exclusion from recovering relating losses arising an act that breaches contractual obligations



Remedies

| Damages | Equitable remedies |
|---|--|
| <ul style="list-style-type: none">• Compensatory damages<ul style="list-style-type: none">• Expectation damages• Reliance damages• Loss of amenity• Distress• Loss of a chance• Restitutionary damages | <ul style="list-style-type: none">• Available only at the discretion of the court<ul style="list-style-type: none">• Injunction• Specific performance• Rescission• Rectification• Account of profits |

Limiting factors:

- Causation/Remoteness
- Mitigation
- Contributory Negligence