PART II – THE PLACE OF CONTRACT WITHIN PRIVATE LAW

I THE LAW OF OBLIGATIONS

A *Doctrinal Intersection*

Private law deals with legal duties owed by individuals to one another.

The law of contract exists alongside doctrines of:

- tort;
    - imposes duties to avoid certain kinds of conduct
    - liability Is fault based
- restitution;
- equity; and
- statute

Contract obligations are self-imposed (voluntarily assumed), whereas obligations in tort, restitution, equity, and statute are externally imposed.

1 *Contract and tort*

Contractual liability often exists alongside obligations in tort. For example:

- a breach of contract may involve the commission of a tort
- a false statement incorporated into a contract may attract liability in both contract (for breach of contract) and tort (for negligent misstatement)

There are two situations where an action in tort will succeed but an action in contract will not:

- if the plaintiff is not a party to the contract, the doctrine of privity of contract prevents them from enforcing its obligations
    - however, in tort, obligations are owed generally to all parties, regardless of whether or not they are signatories to the contract
- where the assessment of damages is zero
    - contract law compensates 'expectation loss'; it places the party in the position they would have occupied had the contract not been breached
    - consequently, if the party would not have been in any different a position had the contract not been breached, there is no recovery
    - tort aims to restore the party to the position they were in *prior* to the commission of the tort
    - consequently, though the wronged party may not suffer expectation loss, they may have been in a better position prior to the defendant's tort

Exam note: mention if a tort action could also apply, and not any differences in damages.

2 *Contract and restitution*

Restitution is concerned with the imposition of obligations to restore unjust gains. It was originally based on the legal faction of an implied promise, and was known as a 'quasi-contract' (since it was based on the implied agreement to restore unjust gains).

Doctrines of restitution were employed where the contract was unenforceable for whatever reason, but justice demanded the plaintiff receive a remedy.

Today, the obligation is imposed simply to prevent unjust enrichment in certain defined circumstances (*Pavey & Matthews Pty Ltd v Paul*).

Exam note: mention if restitution could apply.

Pavey & Matthews v Paul:

Facts
- Pavey agreed to perform building work for Paul
- Paul agreed to pay Pavey 'reasonable remuneration for the work'
- The agreement was *not* reduced to writing
- Upon completion, Pavey claimed to be entitled to $63 000
- Paul only paid Pavey $36 000
- Pavey sued for the remaining $23 000

Issue
- The contract was unenforceable by s 45 of the *Builders Licensing Act 1971* (NSW), which expressly forbade unwritten building contracts
- However, the meaning of the Act was in disagreement:
    - majority: the Act protects building owners from spurious claims for payment by builders
    - Brennan J (dissenting): the Act ensures building contracts were reduced to writing

Reasoning
- Do principles of restitution subvert the intention of the statute?
    - majority: no, since different doctrines (restitution vs contract)
    - Brennan J (dissenting): yes, since remedy contradicts aim of Act
- Did the unenforceable contract have any relevance?
    - it was of evidentiary value, showing that the benefits (improvements) were not intended by Pavey as a gift to Paul
    - showed the amount Paul had paid, and that there was an intention to pay for perceived value
    - however, there is no automatic entitlement to the amount provided for under the contract; under restitution, the court undertakes a valuation independent from the contract's terms
- Deane J:
    - no reason why the builder should be denied other remedies; the legislation only denied a remedy in contract, but did not – like other, similar statutes – explicitly negative all possible actions
    - the court still has the discretion to deny spurious claims
    - the decision would only subvert the legislation if the amount of money claimed in the contract were awarded as damages – the law should not negative the express intention of parliament
    - instead, the amount awarded should be 'no more than what is fair and reasonable in the circumstances' (at 262); this does not contradict the statute

Decision
- Majority: builder's claim successful as it was based on unjust enrichment (restitution), not (implied) contract, so the statute does not nullify the action
- Minority: builder's claim unsuccessful because the unenforceable contract was the sole source of the parties' obligations

- restitution cannot step in to provide the same remedy as contract would have, if successfully pleaded
- if it were allowed to do so in every case, there would be no need for contract law at all

3 *Equitable obligations*

Several equitable obligations are also relevant to contract:

- equitable estoppel (creates rights where the promise does not amount to a contractual obligation)
- fiduciary obligations (obligations to act in the interests of those who place trust in the acting party; eg, a lawyer)
- confidential information (creates a duty to not disclose sensitive information; often embodied in a non-disclosure clause)

Exam note: mention fiduciary obligations if applicable, as well as confidential information if there is a disclosure clause.

4 *Statutory obligations*

Statutory obligations are imposed, where applicable, irrespective of the intention of the parties. For example:

- *Trade Practices Act 1976* (Cth)
  - s 52 – misleading and deceptive conduct (Pt V)
    - this is a very common cause of action
  - implied warranties (Pt V)
  - unconscionable conduct (Pt IVA)

The assumption in these compulsory obligations is that ti is more important to provide a base level of protection that to recognise the will of the stronger party.

However, in some circumstances there is a limited ability to expressly agree to exclude these protective provisions. For example:

- Legislative schemes designed to grapple with new mediums via which a contract may be accepted (eg, electronic) can be overridden by intention

B *Contract Theory – Atiyah (1978)*

The paradigm of modern contract theory is promissory in nature; a contract reflects agreement between the parties. Atiyah challenges the promissory rationalism of contract law.

1 *Classical model of contract law*

The fundamental purpose of contract law, according to the classical model, is to give effect to the parties' intentions.

There is an essential distinction between contract, tort, and restitution, according to the classical model:

- contract law: parties accept obligations
- tort and restitution: obligations imposed upon parties

Atiyah argues that restitution can provide a more coherent approach generally. In certain situations, the validity of traditional understandings of contractual obligation must be questioned.

Assumptions of the classical model:

- contract law is about what parties *intend*, not what they do
    - today, intention is objective; intent is inferred *from* conduct
- a contract is a thing
    - alleviates the need to consider fairness or justice; the contract is the entity
- the role of the court is to encourage parties to adhere to promises by enforcing them
- there is only one model of contract
    - the unification of contract theory enhances its ideological effect

Exam note: identify differences in judicial approaches and tie these approaches to their theoretical underpinnings. Evaluate the law and the validity of each approach, where relevant.

2 *Criticism of the classical model*

An executory contract imposes a present obligation to perform a future act. Atiyah suggests that it is wrong to focus solely on the executory contract, because it is artificial in many contexts (eg, bus passenger purchasing fair and being driven to destination). The classical theory is simply not realistic.

Specifically, it does not:

- Fit many common types of contract
- Give sufficient recognition to the nature of the benefits conferred
- Give sufficient recognition to reliance

Atiyah's criticisms are perhaps less relevant today than when written (1978), due in part to the development of the doctrines of estoppel and equity to fill gaps in contracts and place greater emphasis on reliance and benefits conferred, respectively.

There is still a role for a body of law that enforces executory contracts; though less prevalent, they are nonetheless important. Many large, commercial contracts, for example, are executory in nature.

Note *Pavey*: incompatible with Atiyah's criticism of contract theory, since it clearly blurs the distinction between contract and unjust enrichment. It looks not just at promissory intention, but also at fairness. In this way, contract principles are moving beyond the classical model and becoming more like restitutionary ones.

C *Remedies in Contract*

The award of damages for breach of contract aims to place the injured party in the position he or she would have occupied if the contract had been performed.

Awarding expectation damages is justifiable for several reasons:

- It allows P to derive the benefit of the contract rather than allowing the breaching party to rescind
- In this way, future rights are protected, not just past rights
- If breaching parties were not liable for what they were expected to perform, it allows an easy way out of a contract where the breaching party is yet to perform their part and would be disadvantaged by doing so

- For example, if an insurer – upon being forced to pay out a large claim – is able to breach the contract and only be liable for the claimant's losses to date, then they may only have to refund their premium payments, which could be significantly less than the claim payout
- In short, it would render ineffective many contracts, and reduce the certainty with which all transactions were performed

Gates v Mutual Life Assurance:

Facts

- Mr Gates entered into an insurance contract with Mutual Life
- Mr Gates alleged that the agent who sold him the policy told him that he would be entitled to compensation if he were unable to attend *his* occupation for 90 days
- In fact, the policy only covered him if he were unable to attend *any* gainful employment
- Mr Gates sustained an injury, rendering him unable to attend his occupation as a builder
- However, as his injury did not prevent him from attending a different job, Mutual Life refused to pay the benefit

Issue

- What should the measure of damages be?

Reasoning

- Gates argued that a second contract arose from the statement made by the agent
- In tort (negligence being the cause of action), the plaintiff's damages would be based on the defendant's negligence – ie, a refund of the money he paid for the premium and any additional expectations or opportunities that were frustrated when he entered into the contract with the defendant
    - Thus, Mr Gates reasoned that, had the agent not made the statement, he would not have entered into the contract and instead entered into another one with another insurer that did confer the benefit he expected
    - Inter alia, his loss (in theory) would be the costs associated with his premium payments *and* the payout he would have received from the alternate insurer
- HCA: as a finding of fact, Mr Gates would not have entered into another contract, both because no premium existed at the time that could satisfy the agent's representation, and because Mr Gates had made no indications that he was actively seeking out insurance
- Note, however, that compensation for expectation loss would have been available if the plaintiff could have established that but for the tort of the defendant another insurer would have paid out his claim
- Because the statement of the agent did not form part of the main contract (the premium) or an ancillary contract (the statement), there was no breach of contract

Decision

- Mt Gates was unable to obtain damages for breach of contract, because he was unable to establish that the agent's statement formed either part of the contract or a collateral (secondary) contract

Though this decision may appear unfair, it is important to note the effect of the findings of fact made by the High Court of Australia. Namely, that Mr Gates was unlikely to have pursued a different source of insurance even if he had not been misinformed by the agent. Essentially, the plaintiff is (rightfully) being given no refund for his policy since the benefit derived from the policy (namely, insurance) was still conferred to him. This benefit is simply not what he expected. If the circumstances were appropriate (detriment may be difficult to establish on the facts), he may be able to pursue a claim in equity or estoppel.